SUPREME COURT, U. S.
FILED
NOV 29 1974
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1974

No. 74-668

SHELDON SELIKOFF,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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Law and Financial Printing
South River, N.J. (201) 257-6850
New York, N.Y. (212) 565-6377
Philadelphia, Pa. (215) 563-5587
Washington, D.C. (202) 783-7288

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No.

SHELDON SELIKOFF,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

STATEMENT

Petitioner respectfully prays that this Court issue a Writ of Certiorari to review the order of the New York Court of Appeals rendered the 10th day of October, 1974, affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Department, with the Presiding Justice

thereof dissenting. The Appellate Division had affirmed the judgment of the County Court, Westchester County, rendered the 16th day of August, 1972, convicting the petitioner of grand larceny in the second degree and obscenity in the second degree, upon his pleas of guilty, and sentencing him to a term of imprisonment not to exceed 5 years on the larceny count and a $1,000 fine for the obscenity.

OPINIONS BELOW

The Court of Appeals affirmed the judgment of conviction with an opinion which is reproduced *infra*. The Appellate Division affirmed the judgment of the County Court on the 7th day of May, 1973, with an opinion which is reproduced as well.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The order of the Court of Appeals of the State of New York was made on the 10th day of October, 1974. A copy thereof is annexed.

QUESTIONS PRESENTED

1. Whether petitioner Selikoff was denied due process when the Trial Judge arbitrarily and contrary to the wishes of the defendant and the District Attorney, broke a plea bargain agreement, despite no change in the presentence report warranting such action?

2. Whether a Trial Judge may unilaterally reject a plea bargain made in good faith after full discussions and disclosures

by the District Attorney and defense counsel and following protracted discussions, solely because of the Judge's subjective and visceral feeling that he should not honor it?

3. Whether *Santobello v. New York*, 404 U.S. 257 mandates enforcement of a plea bargain, absent fraud by one of the parties?

4. Where, as herein, a defendant cannot be returned to *status quo ante*, may a Trial Judge unilaterally dishonor a plea bargain agreement by merely offering the defendant an opportunity to withdraw his plea of guilty, to which alternative the defendant is opposed?

5. After protracted negotiations on the highest levels among the District Attorney's staff, the defense counsel, and the Court, the Trial Judge unconditionally and without reservation promised the petitioner that he would not be incarcerated if he pleaded guilty. Whether it was a violation of the due process clauses of the Fifth and Fourteenth Amendments for the Trial Judge to later renege on this promise, despite no change in circumstances?

6. Whether plea bargaining retains any significance at all in view of the New York Court of Appeals' apparent holding that a Judge may always renege on a promise for any reason whatsoever so long as he offers the defendant an opportunity to withdraw his plea of guilty?

(A) The Court of Appeals does not recognize a reciprocal right on the part of the defendant to break the plea bargain by offering to withdraw his plea of guilty.

7. In *Santobello v. New York*, 404 U.S. 257, this Court held that a prosecutor could not renege on a promise made by his assistant. In the petition herein this Court is asked to decide whether a Judge can be held accountable for a promise which he has made which has induced a defendant to change his position in reliance thereon. Does the Judge's action violate due process?

8. Whether the Trial Court's insistence that petitioner withdraw his plea of guilty and then face trial upon all of the revived counts of the four indictments, exposed him to additional punishment and double jeopardy in violation of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments of the United States Constitution are involved herein.

SUMMARY OF ARGUMENT

This petition presents for review an important question involving the entire concept of plea bargaining. The New York Court of Appeals, in a major opinion, in essence, has proclaimed that no plea bargain really may be enforced unless the Judge who made the promise is inclined to honor it.

The obvious thrust that is inescapable from the Court of Appeals' decision is that plea bargains *may be enforced against a defendant* by preventing him from withdrawing it, but *may not be enforced by the defendant* himself since the Trial Judge, for

any reason whatsoever, may reject it by simply offering the defendant an opportunity to withdraw his plea.

FACTUAL BACKGROUND

The Court below incorrectly and without any basis in fact, asserted that the Trial Judge had received misinformation about the involvement of the petitioner in the crime charged. Neither the prosecutor nor the defense withheld any information from the *nisi prius* court.

Selikoff has been indicted under four separate indictments. The two indictments to which he pleaded were in compromise of all four indictments. There was no plea bargain arrived at until all of the parties concerned — that is the Court, the District Attorney, the defense, and the defendant, had thoroughly discussed all aspects of the cases. Petitioner had been indicted with co-defendants. The prosecutor's office participated in the plea bargaining discussions at the highest level. It is absurd, and absolutely without foundation in the record, to say that there was insufficient disclosure. Following this extensive plea bargaining, the Court, without reservation and unconditionally, promised the defendant that it would not incarcerate him if he pleaded guilty. It left the possibility open of a fine or probation, but eliminated the threat of imprisonment.

Subsequently, one or more of the co-defendants went to trial and the same Judge presided at that trial. Selikoff did not participate since he had pleaded guilty and was, therefore, automatically severed.

Not surprisingly, evidence was adduced against Selikoff, but without his ever having an opportunity to confront that evidence or to explain it away. At the time of sentence, there was no attempt by the defendant (petitioner), the District Attorney, or the Probation Department, to cause any change in the plea bargain that had been made and ratified by the Court.

The Trial Judge, *sua sponte*, decided that after sitting in at the trial of the other defendants, that he felt he should not abide by the plea bargain and informed Selikoff that he must withdraw his plea of guilty or suffer the consequences of a prison sentence.

Counsel for Selikoff explained that there had been complete and full disclosure and no change in circumstances. Notwithstanding this fact, the Court persisted. Selikoff's attorney further explained that his client could not be put back in *status quo ante* since he could not be tried jointly anymore but would have to go to trial alone because the plea bargain had effectuated a severance. Again the Court persisted and when Selikoff refused to withdraw his plea of guilty, the Trial Judge imposed a sentence of 5 years imprisonment plus a $1,000 fine.

The Presiding Justice of the Appellate Division, Second Department, dissented, indicating, as we do, that plea bargaining has been dealt a mortal blow in the State of New York, and due process of law has been undermined if this arbitrary and capricious action of the Trial Judge is permitted to stand.

In *Santobello, supra,* this Court held that a District Attorney could not renege on a promise made by one of his assistants.

This case presents the issue of whether a Judge can be held accountable for a plea bargain to which he has become a party and upon which a defendant has changed his position in reliance thereon.

THE OPINION OF THE COURT BELOW ANALYZED

The Court of Appeals considered a trilogy of cases (*People v. Sheldon Selikoff,* No. 368A/73; *People v. Tim Campbell,* No. 368B/74; and *People v. Robert Davidson,* No. 392/73). We petition only on behalf of Sheldon Selikoff.

The Court below wrote an elaborate opinion, through its Chief Judge, tracing the history, to some extent, of plea bargaining. The general tenor of the opinion below is favorable to the concept of plea bargaining. For example, the Court below declared, *inter alia,* "In budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system, not just as to the courts, but also as to local detention facilities."

In addition, the Court below unanimously asserted that plea negotiations serve "many other needs." The Court related that "They relieve the prosecution and the defense too, for that matter, from 'the inevitable risks and uncertainties of trial.' " The Court cites with approval *Santobello v. New York,* 404 U.S. 257 and *Brady v. United States,* 397 U.S. 742.

Another important observation the Court below makes, among the many which it made, is that one of the most important ends of justice served by plea negotiation is that it "enables the Court to impose 'individualized' sentences, an

accepted ideal in criminology, by avoiding mandatory, harsh sentences adapted to a class of crime or a group of offenders but inappropriate, and even Draconian, if applied to the individual before the court . . . ."

In analyzing the *Selikoff* case, however, the Court below was dealing with a situation different than the other two cases. In *Selikoff, the Trial Judge* made an *unconditional promise* without any reservations whatsoever that it would not impose a prison sentence. This is completely different than *in People v. Campbell, where the Court specifically advised the defendant that no absolute promise was made.*

In the Davidson case, the entire colloquy did not reveal any absolute promises.[1] Thus, the Court below recognized that in *Selikoff* the Trial Judge had not conditioned the prospective sentence upon his information at the time of the plea.

The Court below, however, is completely incorrect when it says that the pleading Judge in *Selikoff* implied that the plea of guilty was predicated upon conditions then known. As defense counsel in the Trial Court and in the Courts below said *Selikoff would never have pleaded guilty if the promise was in any way made conditional.*

The plea bargaining system would constitute a trap for any defendant since the plea itself is a complete admission of guilt, and other incriminating information is usually disclosed.

1. Thus, *only* in *Selikoff* was there an *unconditional promise* made! The Trial Court did *not* reserve the right to withdraw its promise as it did in the *Campbell* and *Davidson* cases!

Selikoff revealed both on and off the record a good deal of information the District Attorney did not obviously have on all four indictments. Additionally, the prosecutor secured a severance of Selikoff from the rest of the defendants.

Neither the District Attorney nor defense counsel nor the Probation Department made any request that the plea bargain should not be fulfilled at the time of sentence. The Court was drawing upon its own visceral reaction to information disclosed at a trial of another person wherein Selikoff's name and supposed involvement was mentioned. No opportunity was ever given to Selikoff to respond to this misinformation or to confront the testimony. (See *Harris v. United States*, 382 U.S. 162, 166, where this Court noted that courts not act on surmise in sentencing.) In essence, the Court increased defendant's punishment from hearsay sources so far as Selikoff was concerned. (*North Carolina v. Pearce*, 395 U.S. 711.)

The Court below declares that "Application to plea negotiations of contract law is incongruous." The Court goes on to declare that "Even if the contract analogy were apt defendant would be seeking enforcement of a 'bargain' violative of the statute and the public policy requiring a pre-sentence report before sentence" (CPL 390.20, Subd., 1; *People v. Aiss*, 29 N.Y.2d 403).

The Court below erred in this regard since it failed to realize that *the presentence report was obtained* in the *Selikoff* case and did not recommend a rejection of the plea bargain. *Thus, the Court of Appeals was mistaken when it referred to any violation of the statute or public policy.*

The Court below was *also mistaken* when it stated that Selikoff's position had not changed. On the contrary, not only had he disclosed a good deal of information to the prosecutorial authorities, but he had found himself severed from the case in which he could have gone to trial as a joint defendant rather than have the focus upon himself exclusively.

We believe that the Court below misinterpreted *Santobello v. New York, supra.*[2]

In *Santobello,* this Court enforced an off-the-record promise. In the case at bar, the promise is on the record and unmistakable, containing no qualifications or conditions.

In the *Davidson* case, for example, which is technically not before this Court, but which is part of the opinion on which *Selikoff* is based, the Court below refused to even order a hearing on a claimed broken sentence promise where the trial attorney, under oath, stated that the Judge had broken his promise, and, in the Appellate Division, the prosecution had even consented to a hearing.

We believe, therefore, that the opinion below is so at war with *Santobello,* that clarification of the Judge's role in the plea bargaining system must be, once and for all, clarified.

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2. *Santobello* was successfully argued by the writer of this petition and, therefore, the writer is quite familiar with *Santobello*.

REASONS FOR GRANTING THE WRIT

I.

The plea of guilty interposed by Selikoff was in response to an unqualified and unconditional promise by the Trial Judge that he would not be incarcerated. Petitioner's due process rights were violated when the Court, *sua sponte*, refused to honor the bargain at sentence despite unanimous agreement between the District Attorney and the defense that the bargain should be upheld. Nor was there any matter in the presentence report which indicated any representation.

It is submitted that *Santobello v. New York, supra,* if it means anything, stands for the proposition that a plea bargain made in good faith must be enforced. In the analysis of the New York Court of Appeals opinion, *supra,* we have demonstrated that the Court of Appeals was absolutely incorrect in certain assumptions that it made about the *Selikoff* case. There was a compliance with the statute (390.20, Subd. 1, CPL; see, *People v. Aiss,* 29 N.Y.2d 403).

The position of Justice Gulotta in the Appellate Division (now Presiding Justice of that Court) is extremely cogent and recognizes that any determination that does not uphold the plea bargain as made, in essence destroys the entire concept of plea bargaining.

For example, if the Court is deemed to reserve and possess the right to renege on a plea bargain for its own subjective reasons, then may not a defendant do the same thing? Yet, in

People v. Santobello, 39 App. Div. 2d 654 (1st Dept.) and *People v. Chadwick*, 33 App. Div. 2d 267 (2nd Dept.), the State of New York has held that a defendant has no right to withdraw his plea of guilty but, on the contrary, it must be specifically performed.

What kind of plea bargain do we have if one of the parties thereto is not bound by it? It is an absolute fraud upon the defendant and a mockery of justice to rule that the defendant is at the mercy of the whims of the Trial Judge in negotiating a plea.

We ask this Court to recognize that Santobello wanted to withdraw his plea of guilty, but the Appellate Division refused to permit this and declared that the promise made by the District Attorney would be enforced and that the defendant Santobello had not right to withdraw his plea of guilty (39 App. Div. 2d 654).

We must bear in mind that there was no change in circumstances which warranted the Trial Judge in rejecting the plea bargain (*North Carolina v. Pearce*, 395 U.S. 711).

The interpretation placed upon plea bargaining by the Court of Appeals, namely that a Judge always impliedly retains the right to reject it, renders the entire concept meaningless.

It is the position of the defense, and of the petitioner herein, that once a plea has been accepted and interposed, the Trial Court no longer retains any power, but merely must perform the ministerial act of imposing the sentence promised. We are not

talking about a situation where consent is given by the defendant to withdraw. Nor are we talking about a situation where there has been an obvious deception. In the case at bar there had been no effort on the part of either of the parties to the case, that is the prosecution or the defense, to cause a withdrawal of the plea, nor had there been any allegation of deception practiced by anyone.

The Court itself presided at a trial of co-defendants of Selikoff who elected to go to trial, and who were ultimately acquitted. It appears that during that trial, the Court said it learned certain things about Selikoff which *neither the probation report nor either party had apparently believed to be of moment.*

It must be presumed, however, that the District Attorney was well aware of these facts since the prosecution witnesses in that trial were undoubtedly interviewed by the District Attorney.

If all parties had pleaded guilty, of course, there would be no problem here at all. The Trial Court did not indicate that any new information had been brought to its attention by the Probation Department or by the District Attorney or defense counsel. Apparently it was information which the Court itself acquired during the trial, and it is obvious that the petitioner Selikoff, never had an opportunity to confront the witnesses against him in the trial, nor to give evidence in his own behalf. (See Sixth Amendment; *United States v. Virga*, 426 F.2d 1320, 1323 (2d Cir. 1970); *United States v. Carden*, 428 F.2d 1116-17 (8th Cir. 1970); *United States v. King*, 410 F.2d 1127 (9th Cir. 1969).

Thus, based upon this unilateral uncontradicted information so far as Selikoff is concerned, the Court assumed the verity thereof, and decided to *sua sponte* abrogate the promise which it had made. This is an intolerable and disruptive practice and must not be condoned. (See, *United States v. Solomon*, 422 F.2d 1110 (7th Cir. 1970); *Haller-Robbins*, 409 F.2d 557 (1st Cir. 1969).)

In *Boykin v. Alabama*, 395 U.S. 328, the Supreme Court of the United States explained:

> "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; *nothing remains but to give judgment and determine punishment*" (emphasis ours).

It should be noted, of course, in the case at bar, since the Court had promised that it would not impose incarceration as part of the sentence, the only judgment that could be imposed was one of probation and/or a fine.

When the Court, out of the clear blue sky, decided that it would not honor its prior commitment, it directly violated the letter and spirit of *Boykin v. Alabama, supra.*

In *Kercheval v. United States*, 274 U.S. 220, 223, the Supreme Court ruled:

> "A plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession; it is itself a conviction. *Like a verdict*

> *of a jury*, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence."

Under the foregoing circumstances, can there by any doubt whatsoever but that the Court below and the Trial Court was incorrect in its interpretation?

Many situations come readily to mind in which a defendant may protest his innocence altogether and still offer to plead guilty intelligently, deliberately, and freely. In the case at bar, Selikoff maintained that the case in which he pleaded guilty was the weakest case against him. The reason he took the plea was because of the fact that the other indictments, he felt, were stronger. As a matter of fact, two co-defendants in the case in which he pleaded guilty were acquitted, which seems to justify his own feeling that it was a weak case.

Be that as it may, one of the situations one can envisage is the following: A man accused of murder might well offer to plead to manslaughter if he were convinced a jury might not believe his claim of self-defense or accident as opposed to the witnesses who would give testimony supporting malice and deliberation (Cf. *North Carolina v. Alford*, 400 U.S. 25 (1970).)

Another instance might be a three-time "loser" protesting innocence, who might well prefer to plead to a misdemeanor instead of running the risk that a jury might believe that he had committed an armed robbery or other serious felony.

There are many other instances where defendants face serious charges, particularly those who have prior criminal

records, who are found in incriminating circumstances or who may be aware that alleged victims of the crime will testify against them. Such defendants may very well wish to plead guilty to a lesser offense rather than face a possible heavy sentence on conviction of a higher charge, despite their honest belief in their own innocence.

What the Court did here in effect, by refusing to accept and honor its promise, was to expose Selikoff to much greater punishment. This we shall deal with in a future Point.

II.

The Trial Court exposed Selikoff to double jeopardy and violated his rights to due process of law by demand that he withdraw his plea upon pain of being sentenced to incarceration in spite of the Court's promise to the contrary at the time the plea was interposed. Withdrawing the plea would expose Selikoff to considerable additional jeopardy and punishment.

In *Green v. United States*, 355 U.S. 184, 187, the Supreme Court of the United States interpreted the provision of the Fifth Amendment of the Constitution, explaining that it:

> ". . . was designed to protect an individual from being subjected to the hazards of a trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and

> ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that eventually, though innocent, he may be found guilty."

See also, *Benton v. Maryland*, 395 U.S. 784.

In *North Carolina v. Alford, supra*, the Supreme Court of the United States by a 6-3 majority held:

> ". . . While most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual . . . may voluntarily, and knowingly, and understandingly consent [to a plea] even if he is unwilling or unable to admit his participation in the acts constituting the crime" (*Id.* at 37).

In *Alford, supra*, the Supreme Court further explained *(Id.* at 38):

> "Our holding does not mean that the trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . although the states may by statute or otherwise confer such a right. Likewise, the states may bar their courts from accepting guilty pleas from any defendants who assert their innocence. . . ."

In the case at bar, however, it must be borne in mind that the petitioner had pleaded guilty with the concurrence and approval of the Court and the prosecutor. So the issue here is not whether the Court should accept the plea of guilty, since the plead of guilty is already a *fait accompli*. The issue is whether or not, having accepted it and approved it, can the Court now arbitrarily and unilaterally refuse to honor its commitments pursuant to that acceptance?[3]

Since it has been held in *Boykin v. Alabama, supra*, that a plea of guilty is the same as a verdict of a jury, and indicates an acquittal of the other charges which were pending against him, for the Court below to have said that nevertheless Selikoff could be tried for those other offenses, or that Selikoff *could receive* additional punishment over and beyond that which was promised, is an obvious exposure to double jeopardy and double punishment. As a matter of fact, in *Green v. United States, supra*, the Court reasoned that the defendant was entitled to the benefit of the plea of *autrefois acquit* or former acquittal stemming from the jury's implied acquittal of the other counts. In the *Green* case, they were referring to murder first degree.

The issue herein has been considered by the United States Court of Appeals for the Sixth Circuit, number 72-1792, (Civil 38347), decided April 24, 1973. The case was *Rivers v. Lucas*.

Rivers v. Lucas, supra, was consistent with a prior decision of the Sixth Circuit in *Mullreed v. Kropp*, 425 F.2d 1095 (6 Cir. 1970).

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3. Thus, it is patent that New York could legislatively forbid lesser pleas, but if it permits them at all, then the courts may not arbitrarily refuse to enforce them as made

In *Rivers*, it appears that the defendant has been charged with murder first degree, but pleaded guilty to manslaughter. Later, an appeal reversed that conviction by plea of guilty and nevertheless the Michigan Court held that the defendant Rivers could be retried on the murder charge. The Sixth Circuit which had the cases on *habeas corpus*, declared that that was incorrect, and that Rivers could only be retried for manslaughter or a lesser count.

The Sixth Circuit referred to *Green v. United States*, 354 U.S. 184, wherein the Supreme Court discussed the history and development of the double jeopardy clause. A defendant can be tried a second time for the *same offense* following a successful appeal from a prior conviction. But the higher counts are not reinstated. See *North Carolina v. Pearce*, 395 U.S. 711 (1969).

In *Price v. Georgia*, 398 U.S. 323 (1970), the Supreme Court held that a jury conviction of manslaughter implied an acquittal of the charge of murder, and the defendant could not again be subjected to the hazard of a murder conviction following reversal of the manslaughter conviction. The Court emphasized that the prohibition against double jeopardy is not one against being twice punished, but is concerned with the "risk" or hazard of conviction of an offense of which a person has been acquitted.

The Sixth Circuit declared in *Rivers* that the acceptance of a plea to an included lesser offense was a determination that the right to prosecute the defendant on the more serious offenses had been relinquished (Slip opinion p.5):

> "The effect of the entire transaction, for double jeopardy purposes, is the equivalent of a jury's refusal to convict on the more serious charge. Only if this is true may a defendant seek review of his conviction without being faced with the 'incredible dilemma' of choosing between a legal right of appeal and the possibility that success will revive the hazard of conviction of a charge which the prosecution had willingly abandoned in the exchange for his plea" *Mullreed v. Kropp, supra,* at 1102.

> "The continuation principle of jeopardy makes it possible for appellee Rivers to be tried again for the same offense of which he was convicted by his guilty plea (manslaughter), but his successful appeal did not open the way for him to be once again subjected to the risk of a prosecution for murder."

Since it is apparent that the plea of guilty herein was the equivalent of a jury verdict of guilty, the Trial Court had no right, without an appropriate motion being made, to vacate that on its own. (*United States v. Jorn,* 400 U.S. 470.)

III.

The plea bargain and its aftermath considered.

The Court during the allocution of the petitioner at his plea arraignment, *sua sponte,* placed on the record the following promise which indicated a culmination of a series of conferences

with the defense and with various high eschelon representatives of the People:

> "The Court: At this point Mr. West I would like to place on the record, Sheldon Selikoff. *I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you.* Based upon the results of the conferences and conversations and the fact and representation made to the Court, I indicated to the attorney and *I am now indicating to you* that in my opinion in the interest of justice *that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?*
>
> Sheldon Selikoff: *Yes, sir."* (Emphasis ours.)

At the time of sentence on the 16th of August, however, the Court abruptly announced that it would not abide by its promise at the plea session, but that it would offer Selikoff an opportunity to withdraw his plea of guilty, thus reviving all four indictments, and prepare for trial thereon.

Defense counsel Lanna notified the *nisi prius* judge that his client would not withdraw his plea, but would expect fulfillment of the promise. *The colloquy indicates that there were protracted and in depth discussions with the defense and several Assistant District Attorneys, including the Chief Assistant. It appears that*

the Trial Court was therefore, fully apprised of all of the circumstances concerning the pleas. It is manifest that the Trial Judge was probably more fully informed about this particular defendant's background than most others who take pleas in view of the numerous conferences the Court conceded it had conducted with counsel for Selikoff and several prosecutors.

It is submitted that in most cases, a Court may learn somewhat more about a person after a full trial. In the case at bar, however, petitioner relinquished his trial rights to interpose the pleas of guilty in satisfaction of all charges.

Thus, whatever was adduced about him at the trial of the other defendants had the unbridled leeway of an inquest, since Selikoff was not present and could neither cross examine, nor contradict what was asserted by any witness. The Trial Court, incomprehensibly, apparently "believed" all the bad things that may have been adduced about Selikoff at the trial of the others, despite the fact that the jury acquitted the others.

No plea of guilty is worth a "tinker's damn" if a Court may unilaterally disavow its promises which induced the plea because of a fickle change of mind.

It was just this type of indifference and capriciousness which caused the Supreme Court in *Santobello v. New York*, 404 U.S. 257 to unanimously reverse and direct that there must be specific performance of such plea bargains!

The quotations, *infra*, from the sentence minutes ought to be sufficient to convince this Court that the Trial Judge erred and that it should grant certiorari and then reverse and direct

specific performance of the promise. This is particularly true, since the Trial Judge did not reserve the right to rescind the promise as some judges, including himself we were told, frequently do. The colloquy, *inter alia*, was as follows (A11-13):

> "The Court: . . . Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.
>
> Now, what is the decision?
>
> Mr. Lanna: If Your Honor, please, with all due respect to the Court, Mr. Selikoff is not desirous of withdrawing his pleas of guilty as heretofore entered on May 12th 1972 during the course of the trial under Indictment No. 997 of the year 1970. Those pleas being entered to both that indictment and Indictment No. 606 for the year 1970 in full satisfaction of those indictments and also Indictments No. 998 and 999 for the year 1970.
>
> May I state for Your Honor although I am not aware of what is in the pre-sentence report except to what Your Honor has already indicated, that we predicate our refusal, first, on the ground that we do not wish to withdraw those pleas. Secondly, I believe that legally, and despite what Your Honor may extract from that pre-sentence report, we have an absolute right

not to withdraw them and to permit them to stand. I think the authority along those lines is the case of *North Carolina against Alford*, 400 U.S. 25, which was also followed in *People against Fooks*, 21 N.Y. 2d 338, and *People v. Creazzo*, 39 App. Div. 2d 748, and, of course, *Alford*, Your Honor undoubtedly knows, dealt with a situation where it was the defendant who was desirous of withdrawing a plea of guilty and the Court in North Carolina wouldn't permit it, and they went up to the U.S. Supreme Court. The Supreme Court, in substance, said that there may be many reasons why a person who professes his innocence may yet wish to enter a plea of guilty to particular charges, perhaps so similar to the person who is gun shy and does not wish to go into combat, similar to the person who does not wish to expose himself to the possibility of a conviction with an onerous sentence which might be imposed. Therefore, even though he professes his innocence, he would rather play it safe, so to speak.

However, there is yet another ground where in this case Mr. Selikoff has a right to continue his plea. *As Your Honor undoubtedly recalls, we had rather extensive discussions in chambers during the course of the trial under Indictment No. 997 for the year 1970, at which time I believe several representatives of the District Attorney's Office were there. Mr. West, who was the Chief*

Trial Counsel, Mr. Christiansen, who was assisting him, and at one stage or another we had Mr. Moley, who I believe is in charge of that Trial Division, if that is his proper title, and, of course, *Mr. Thomas Facelle, who is Chief Assistant District Attorney of this County.* We discussed with you the circumstances surrounding this indictment as well as Indictment 998 and 999 for the year 1970, and it's my recollection that in addition to myself, the attorney of record for Mr. Selikoff I being trial counsel, as Your Honor might recall, Mr. Scancarelli and I both informed Your Honor that although we felt Mr. Selikoff was not under Indictment 997 of the year 1970 truly criminally implicated in it, we were most concerned regarding Indictments 998 and 999 for the year 1970, and in addition to that fact we pointed out to you Mr. Selikoff's background, that he had a prior problem in the Federal Courts out of Newark, New Jersey district, and it's my recollection that the *District Attorney and his representative or representatives, depending upon which time we are speaking of, were all there and they certainly were aware of what their case file had as regards whatever Marx's testimony was going to be and they were willing to accept these pleas and did state at the time that they would have no recommendation as to sentence."* (Emphasis ours.)

As the dissent in the Appellate Division indicated,

"On the other side of this coin, i.e., where a defendant has demanded the right to withdraw his plea and the People have insisted on specific performance of the plea bargain, both this Court in *People v. Chadwick* (33 A.D. 2d 267) and the First Department in *People v. Santobello* (39 A.D. 2d 654) have required specific performance. In contrast, here we have the defendant demanding specific performance.

The law must be fair and there is little justice in adopting or pursuing a rule which does not apply equally to The People and to the defendant." (Emphasis supplied.)

IV.

A valid plea bargain was entered into between the Court, the District Attorney and the petitioner whereby Selikoff pleaded guilty to the charges of grand larceny second degree and obscenity second degree in compromise of all outstanding charges. The plea bargain expressly declared through the lips of the Trial Judge, himself that petitioner would not be incarcerated, but that he might otherwise be punished, presumably through probation or fine. The Court unilaterally and without the consent of the petitioner broke this plea bargain and interposed a 5 year sentence and a fine. The facts are not in dispute.

The petitioner, his counsel, the District Attorney and the Court had numerous conferences not only with the trial Assistant District Attorney, but with high echelon personnel

from the District Attorney's office, and completely explored every aspect of the *Selikoff* cases. Finally there was an agreement which was struck whereby the petitioner consented to interpose pleas of guilty to two indictments, namely grand larceny, second degree and obscenity, second degree in exchange for a promise that all of his outstanding indictments would be merged into these and that under no circumstances would he be incarcerated.

The Trial Court did not make the plea of guilty conditional and did not reserve the right to direct a withdrawal as is sometimes done by judges, and we understand is sometimes done by Judge Burchell himself. It is very significant, therefore, that Judge Burchell made this an unconditional promise which was bilateral. There is no doubt whatsoever that the District Attorney agreed to this, the Court agreed to it, and Selikoff consented to it.

The Trial Court, on the day of sentence, was confronted with the paradox that Selikoff had pleaded guilty with a promise of no incarceration, and two co-defendants who did go to trial were acquitted. Only a cooperating co-defendant, that is cooperating with the District Attorney, had also pled guilty, and, therefore, despite all of the indicements which had been returned by these grand juries in Westchester County, it appeared that the Court would have no one to send to jail for any extended period of time.

We state this in a rather glib conjecture because the actions of the County Court are otherwise inexplicable.

Without denying that it had made a categorical promise to the petitioner that it would not incarcerate him, the Trial Judge

at the time of sentence declared that after going through the trial of the other defendants in the case, it had learned certain additional facts of which it was not aware at the time that the plea bargain was struck. *No allegation of deception is even suggested.*

The Court therefore declared that it would unilaterally break the promise and plea bargain, but would offer an opportunity to Selikoff to withdraw his pleas of guilty and reinstate all of the indictments and counts which had previously been extant.[4]

This means of course, that Selikoff would be facing trial on four (4) indictments, and that he had been severed from the instant case by virtue of his prior plea of guilty which had been interposed during the trial itself. He had also made certain admissions, and discussed these matters with the probation department and prosecutors. His counsel had unquestionably disclosed many matters which otherwise would not have been revealed had there been no plea bargain.

Additionally, one of the reasons for accepting the plea bargain was that Selikoff, while not concerned about the indictments particularly to which he pleaded guilty, was concerned about two other indictments which were merged into it in satisfaction of the plea agreement. (See colloquy at sentence, *supra.*)

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4. Under the Trial Judge's view, he might even direct withdrawal of a plea after judgment, *nunc pro tunc*, if the jurist claimed to have learned additional "facts". No plea is safe so long as this case is law.

In other words, Selikoff indicated that he would not ordinarily have pled guilty to anything had it not been for the fact that he was concerned about the other two indictments against him. Only because of the offer to consolidate all of his outstanding indictments and permit him to plead guilty in resolution of the entire package, did he agree to plead guilty. The Court now vainly hoped to force him in *status quo ante,* which of course, meant that he would be facing charges on four indictments, which had induced his plea of guilty in the first place.

The Court indicated that a Mr. Marks had testified and revealed certain things that the Court was not aware of concerning Selikoff's role in certain criminal enterprises.

The defense counsel, Mr. Lanna, however indicated that Marks had not been subject to cross examination by Selikoff at the trial, since Selikoff had pleaded guilty during the trial, and, furthermore, there was no testing of the credibility of Marks with respect to allegations against Selikoff which of course he could make without challenge.

The most important factor, however, was that Selikoff declared that he declined to accept the Judge's offer to withdraw his pleas of guilty and insisted upon the fulfillment of the plea bargain. (Cf. *United States v. Jorn, supra.)*

It is submitted that Selikoff was absolutely justified in his position, and the decisional law backed by him completely. By coincidence, the author of this brief successfully argued the case of *Santobello v. New York,* 404 U.S. 257, wherein this Court

unmistakably declared that where a plea is negotiated the plea bargain must be fulfilled. The petitioner according to 4 of the 7 justices, might be given the option to withdraw the plea bargain under certain circumstances where it has been broken, but it was at the option of the petitioner and no one else. In other words, the District Attorney and the Court had no option to compel withdrawal of a plea bargain without the consent of the petitioner. (*United States v. Jorn, supra; Santobello, supra.)*

In *People v. Santobello,* 39 App. Div. 2d 654, 655, (leave to appeal denied), which is the decision of the Appellate Division, First Department, upon the remand from the Supreme Court of the United States, the Appellate Division clearly declares that a defendant who interposes a plea of guilty, pursuant to a plea bargain, cannot withdraw that plea, and that the plea bargain must be fulfilled as made.

There the Court declared, *inter alia:*

> "On the record, as held by the United States Supreme Court, the defendant 'bargained' and negotiated for a particular plea in order to secure dismissal of *more serious charges,* but also on condition that no sentence recommendation be made by the prosecutor . . . . It was held that under the circumstances, this Court should 'decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced before a different judge, or whether in view of the State Court, the circumstances require granting the

> release sought by the petitioner, i.e., the opportunity to withdraw his plea of guilty . . . . On the record, it conclusively appears that the defendant's plea of guilty was entirely voluntary and intended in itself as a complete act in a final disposition of the charges against him, with the sentencing function to be exercised as a matter of course following a performance of the prosecutor's promise. This defendant, not inexperienced in criminal proceedings, and represented by counsel of his choice, knew well the nature and effect of his plea of guilty . . . . There was no certain coercion or overreaching on the part of the prosecution; the prosecutor's promise did not deprive the defendant's guilty plea of the "character of a voluntary act"; nor is the vacatur of the plea required on the basis that there is an outraged sense of fairness' . . . . "

The Court continued and declared:

> "Here, due process in the interests of justice will be fully served by a remand for sentence with the specific performance of the prosecutor's promise. (See, e.g., *People v. Keehner*, 28 A.D. 2d 695, aff'd, 25 N.Y. 2d 884 . . . . "

In short, the District Attorney and the Judge, as well as the defendant in the *Santobello* case, were bound by the plea bargain that was made and the Appellate Division declared that

it must be enforced as made and could not be unilaterally renegotiated or revoked or withdrawn.

V.

The Court of Appeals agreed with this Court that plea bargaining serves many useful purposes and is essential to the survival of an orderly administration of criminal justice. Yet, the determination that a fickle Trial Judge unilaterally may break a plea bargain, made without reservation, renders this concept an utter nullity since only one party is bound.

In our analysis of the Court of Appeals opinion, *supra*, we have quoted several passages wherein the Court of Appeals notes how important plea bargaining is to the survival of the criminal justice system. It also notes that only a Judge can permit the withdrawal of a plea of guilty, but a defendant who feels that he has acquired information which if made known would have caused him to go to trial, he's "out of luck" since he has no way of enforcing a withdrawal of his plea of guilty.

If fundamental fairness and equal protection of the laws and due process mean anything, it means that a defendant must be accorded the right to enforce a plea bargain that has been made without deception as herein and no Judge may be given the right to arbitrarily refuse to enforce such a bargain once made, absent fraud.

Just as a defendant is bound by a bargain made, which in retrospect he is not too happy with, so, too, must a Judge be bound by a bargain he has entered into with which, in

retrospect, perhaps, he is not overjoyed. (*Coppedge v. United States*, 369 U.S. 438):

> "When society acts to deprive one of its members of life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without need for prompt, *eminently fair* and sober criminal law procedures. The *methods we employ in the enforcement of our criminal law* have aptly been called the measures by which the quality of our *civilization may be judged.*" (Emphasis ours.)

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

s/ Irving Anolik
Attorney for Petitioner

APPENDIX

ORDER OF AFFIRMANCE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

(Filed October 10, 1974)

Court of Appeals
State of New York

The People of the State of New York,

Respondent,

-against-

Sheldon Selikoff,

Appellant.

Orders of the Appellate Division, First Department affirmed. Opinion by Chief Judge Breitel.

All concur.

October 10, 1974

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Clerk

OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

2 No. 368A 73

The People etc.,

Respondent,

vs.

Sheldon Selikoff,

Appellant.

AT No.368B 74

The People, etc.,

Respondent,

vs.

Tim Campbell,

Appellant.

Opinion of the Court of Appeals

1 No. 392 73

The People, etc.,

Respondent,

vs.

Robert Davidson,

Appellant.

BREITEL, Ch. J.:

These three appeals by defendants present issues arising from convictions based on negotiated guilty pleas. They raise the question whether a defendant may show that his guilty plea to a lesser crime was induced by an off-the-record unfulfilled promise, although contradicted by the recorded colloquy on the taking of the plea. Also at issue is whether a defendant is entitled to be sentenced as promised, or, if the court cannot or will not sentence as promised, whether the defendant is entitled to no more than the right to withdraw his guilty plea.

In each case the order of the intermediate appellate court affirming the conviction should be affirmed.

Throughout history the punishment to be imposed upon wrongdoers has been subject to negotiation (see, Comment, The Plea Bargain in Historical Perspective, 23 Buffalo L. Rev. 499,

500-501). Plea negotiation, in some form, has existed in this country since at least 1804 (see, *id.* at 512). Even in England, where there are no public prosecutors, no inflexible sentencing standards, and considerably less pressure on the trial courts, a limited form of plea negotiation seems to be developing (compare, Cooper, Plea Bargaining: A Comparative Analysis, 5 N.Y.U. J. Int. L. & Pol. 427, 435; Thomas, Plea Bargaining and the Turner Case, 1970 Crim. L. Rev. [Eng.] 559, 561-565, *with* Davis, Sentences For Sale: A New Look at Plea Bargaining in England & America, 1971 Crim. L. Rev. [Eng.] 150, 223, 225). Moreover, convictions upon guilty pleas, pleas probably to lesser crimes, have been high since 1839 both in rural, where there is little trial court congestion, and in urban areas, where there is much congestion (1974 N.Y. Judicial Conference Annual Report, A-97 - A-99, A-129; Moley, The Vanishing Jury, 2 So. Calif. L. Rev. 96, 107, 109). History and perspective suggest, then, that plea negotiation is not caused solely, or even largely, by overcrowded dockets. This is not to say, however, that plea negotiation is not acutely essential to relieve court calendar congestion, as indeed it is (President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, 135 [1967]). In budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system, not just as to the courts but also as to local detention facilities.

Plea negotiations, of course, serve many other needs. They relieve the prosecution and the defense too, for that matter, from "the inevitable risks and uncertainties of trial" (President's

Commission Report, *supra*, at 135). The negotiation process which results in a guilty plea telescopes the judicial process and the necessarily protracted intervals involved in charge, trial, and sentence, and even appeals, hopefully starting the offender on the road to possible rehabilitation (see, *Santobello v. New York*, 404 U.S. 257, 261; *Brady v. United States*, 397 U.S. 742, 752; American Bar Association Project on Standards For Criminal Justice, Standards Relating to Pleas of Guilty, 40-41 [1968]). The process also serves significant goals of law enforcement by permitting an exchange of leniency for information and assistance (President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, 10 [1967]).

Perhaps most important, plea negotiation serves the ends of justice. It enables the court to impose "individualized" sentences, an accepted ideal in criminology, by avoiding mandatory, harsh sentences adapted to a class of crime or a group of offenders but inappropriate, and even Draconian, if applied to the individual before the court (Newman, Conviction: The Determination of Guilt or Innocence Without Trial, 112-115 [1966]). Obviously no two defendants are quite alike even if they have committed, in legal definition, identical offenses. The negotiation process often brings to light mitigating circumstances unknown when the defendant was charged (Enker, Perspectives in Plea Bargaining, in Appendix A to Task Force Report, *supra*, at 110).

> "[C]riminal conduct must be described in generalized terms. The rules must sweep together identical acts with their markedly different actors

amid infinitely variable circumstances. So, as the chancellor and the general verdict of the jury softened the impact of common law rules in the civil law field, so discretion functions to provide the selectivity needed in criminal law enforcement. Thus, the respectable businessman who inadvertently carries a pistol across state lines need not be treated as the gangster who is caught with an unlicensed revolver. Nor need the nurse who technically violates the narcotics law be treated as a criminal because she unwisely administered to a patient in excruciating pain . . . .

[T]here is the much-maligned, but almost universally used, discretion by prosecutors and courts in accepting lesser pleas. . . .It is sometimes a finer adjustment to the particular crime and offender than the straight application of the rules of law would permit." (Breitel, Controls in Criminal Law Enforcement, 27 Chi. L. Rev. 427, 431-432; see, also, Newman, op. cit., *supra,* at 112-129 [1966])

Plea negotiations serve other laudable purposes (see, Newman, *op. cit., supra,* at 105-111; Enker, *supra,* at 109-110). Like procedures to protect the integrity of the factfinding process at trial, still-developing modern practices are available to assure the integrity of the guilty plea (see, e.g., *People v. White,* 32 N Y 2d 393, 399-400; *People v. Flowers,* 30 N Y 2d 315;

People v. Nettles, 30 N Y 2d 841; see, generally *People v. Nixon*, 21 N Y 2d 238*; ABA Standards, §§ 1.5 - 1.7). Where a defendant denies guilt, or if the court believes defendant may be innocent, and the guilty plea is not otherwise justified as knowingly and intelligently made, the guilty plea may be and should be rejected (see, e.g., *People v. Beasley*, 25 N Y 2d 483; *People v. Nixon*, 21 N Y 2d 338, 351, *supra; People v. Serrano*, 15 N Y 2d 304; see, also, *North Carolina v. Alford*, 400 U.S. 25, 31-39).

In *People v. Selikoff*, the first of the three appeals before the court, defendant, in Westchester County Court pleaded guilty to second degree grand larceny in full satisfaction of 38 counts in three indictments arising out of a complicated real estate "swindle." Defendant also pleaded guilty to obscenity in the second degree in satisfaction of another fourth multi-count indictment. In accepting the guilty pleas, the pleading court stated on the record that based on the representations made by the prosecution and defense counsel, as well as on the facts known to him, it was his then opinion that no sentence of imprisonment would be imposed. Subsequent to the pleas, the same judge presided at the trial of the co-defendants. As the result of his experience in the trial, the judge concluded that the pleading defendant's role in the fraudulent scheme had not been peripheral, as he had been advised during the plea negotiations, but that defendant had been a principal participant. The pre-sentence report stated that defendant denied both his role in the fraud and his guilt of the obscenity charge.

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*See, cert. den. *Robinson v. New York*, 393 U.S. 1067.

Opinion of the Court of Appeals

On sentence, based upon his later information and views, the sentencing judge stated that he could not and would not perform his conditional promise of no imprisonment. He offered defendant an opportunity to withdraw his guilty pleas. Defendant rejected the opportunity and insisted on performance of the "promise." Consequently, the court sentenced defendant to an indeterminate five-year sentence on the grand larceny charge and a $1,000 fine on the obscenity charge. The Appellate Division affirmed the convictions (41 A D 2d 376).

In *People v. Campbell*, the second appeal before the court, defendant, after a preliminary hearing on charges of felony drug possession, was held for action by the grand jury. Thereafter, at direction of the grand jury, a prosecutor's information charging only misdemeanor drug offenses was filed in New York City Criminal Court. Following negotiations between defense counsel and the prosecutor, the charges were reduced to loitering for the purpose of using or possessing a dangerous drug (Penal Law, § 240.36). The prosecutor stated on the record that he would recommend to the court that no prison sentence be imposed, and, supposedly, off the-record, he had stated to defendant and his counsel that if it were imposed, then the People would not oppose a motion to withdraw the plea. The full negotiation and agreements were not on any record and the last conditional promise was never disclosed to the pleading court.

When arraigned for his guilty plea, defendant stated that the only promise which induced his plea was that the People would recommend a fine or probation. Defendant, in response to a question, asserted that there were no other promises. The

prosecutor, who had handled the plea negotiations, made the record inquiries of defendant, and stated that the only promise had been that the People would recommend probation or a fine. The pleading court, however, informed defendant, in emphatic terms, that the prosecutor's recommendation was merely advisory and in no way binding upon the court. Defendant was also informed that a prison sentence might well be imposed, if, after reading the pre-sentence report, the court deemed it proper. The court asked whether this was understood and the defendant gave an affirmative response. The court also inquired whether defendant still wished to plead guilty or did he wish to "withdraw" his plea. Defendant stated that he still would plead guilty. At sentence, the court, in light of the sixty-nine-year old defendant's extensive criminal narcotics record consisting of 27 arrests or convictions, advised that he would impose a three-month sentence of imprisonment. The prosecutor immediately informed the court of the prior undisclosed arrangement by which the People would not, in the event of a prison sentence, oppose a motion by defendant to withdraw his guilty plea, and that defendant "would be permitted to withdraw his plea." The court pointed out that it had made no such promise and nothing was said of such a "promise" when the plea was entered. (For what it is worth defense counsel never made a formal motion to withdraw the guilty plea.) The court sentenced defendant to a term of three months. The Appellate Term unanimously affirmed the conviction.

In *People v. Davidson*, the third of the appeals before the court, the defendant was charged, in New York County, with murder and in a second indictment with an unrelated larceny.

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Defendant pleaded guilty to second degree manslaughter in satisfaction of both indictments. Before entry of the plea the court, defense counsel, and the prosecutor engaged in an off-the-record discussion. On the record, the court told the defendant that as it then understood the facts, and contingent upon the pre-sentence report, sentence would be no greater than from three to ten years. If after reading the pre-sentence report, the court found that it could not impose that sentence, defendant would be permitted to withdraw his guilty plea.

Defendant was asked by the court if any other promises had been made and he replied in the negative. The guilty plea was then accepted. At sentence, defendant was sentenced for a term of three to ten years, precisely as had been contingently "promised" on the taking of the guilty plea, according to the record.

The Appellate Division affirmed the conviction (40 A D 2d 628). Leave to appeal to this court was denied.

Defendant twice unsuccessfully sought post-conviction relief in the nature of *coram nobis*. Shortly after the first application the sentencing judge died. The second application, supported only by defendant's affidavit, alleged an unfulfilled promise by the then deceased judge. In due course, defendant sought reargument of the second application, this time supported by an affidavit from his attorney at time of plea and sentence. The substance of the attorney's affidavit was that the sentencing court had told the attorney that defendant would receive a maximum of four years, a flat contradiction of the deceased

judge's statements on taking the guilty plea. The affidavit further averred that defendant had been so informed and upon such information had entered his guilty plea. The application was denied without a hearing, and the Appellate Division affirmed (42 A D 2d 957). The present appeal concerns this second post-conviction application.

Significant factors suggest affirmance in the *Selikoff* case. While the court, unlike that in the *Davidson* case (*vide supra*), did not expressly condition the prospective sentence upon his information at the time of plea, the pleading judge stated that the prospective sentence was based on information then known and representations then made. By the strongest necessary implication, the court was indicating the conditional foundation for the "promise". There are, however, policy considerations which go beyond the literal reading of the plea minutes. A penal sanction has, at least, the purposes of deterrence, rehabilitations, and social protection. To enable the court to perform its function, the statute mandates, and it is the public policy of this state to require, a pre-sentence report before sentence be imposed (CPL 390.20, subd. 1; *People v. Aiss*, 29 N Y 2d 403).

A judge may not ignore those provisions of law designed to assure that an appropriate sentence is imposed (Cf., *People v. Lopez*, 28 N Y 2d 148, 151). Thus, any sentence "promise" at the time of plea is, as a matter of law and strong public policy, conditioned upon its being lawful and appropriate in light of the subsequent pre-sentence report or information obtained from other reliable sources. That the court in the *Selikoff* case did not explicitly condition its "promise" (although the implication

could hardly be clearer) upon its later evaluation after reading the pre-sentence report, or the facts it learned from the trial of the co-defendants, is therefore of no consequence.

In demanding "specific performance" of the promised sentence defendant would apply commercial contract law to plea negotiation. (Interestingly enough, if contract law were applicable, the negotiations would probably not have produced a binding agreement, either for fraud in the inducement or for unilateral mistake knowingly suffered to occur by defendant.) Application to plea negotiations of contract law is incongruous. The strong public policy of rehabilitating offenders, protecting society, and deterring other potential offenders presents considerations paramount to benefits beyond the power of individuals to "contract". Even if the contract analogy were apt defendant would be seeking enforcement of a "bargain" violative of the statute and the public policy requiring a pre-sentence report before sentence.

Defendant Selikoff was afforded an opportunity to withdraw his plea of guilty. This opportunity he was entitled to receive since the foundation for the plea, regardless of fault, had proven to be without substance. The record does not disclose any change of position by defendant, other than what occurs on any plea of guilty. Circumstances conceivably might arise which, in justice, would require granting a defendant the consideration he was advised he would receive at the time of his guilty plea. But, notably, in the very rare situations (not to be encouraged if only for the delay it would entail and the perhaps premature disclosure by defendant) where it may be desirable to have a

firm sentence commitment in advance of sentence the court may order, and the defendant may request, a pre-sentence report before the plea is accepted (CPL 390.30, subd. 3; see, also, Task Force Report, *supra*, at 13). Had defendant Selikoff exercised his option to withdraw the guilty plea, he could have requested that the trial be presided over by a judge other than the one who had received the guilty plea (cf., *Santobello v. New York*, 404 U.S. 257, 263, *supra; People v. Barner*, 39 A D 2d 985; see, President's Commission Report, *supra*, at 136).

The views expressed are consonant with the rationale and holding in *Santobello v. New York (supra)*. There, the Supreme Court held that the failure of a prosecutor to honor his off-the-record promise to make no sentence recommendation rendered invalid the guilty plea induced by the promise. The Court left it to the discretion of the state courts whether either to allow defendant to withdraw his plea, or to fulfill the aborted promise by vacating the sentence and remanding the proceedings for resentence before a different judge, without a prosecutor's sentence recommendation. On remand, the Appellate Division vacated the sentence and returned the case to the Supreme Court for resentencing (39 A D 2d 654). The *Santobello* case and the Appellate Division determination on remand to it suggest that the failure or inability to fulfill a promise requires either that the plea of guilty be vacated or the promise fulfilled, but there is no indicated preference for one course over the other. The choice rests in the discretion of the sentencing court.

People v. Esposito (32 N Y 2d 921) is not to the contrary. In that recent case this court ordered fulfillment of a sentence promise because, as matters had eventuated, to allow withdrawal

of the plea would have given to defendant more than he was entitled. In *Esposito*, vacating the plea may well have resulted in dismissal of the charges because of the difficulty, if not inability, of the prosecution to locate the witnesses necessary for trial of the then stale indictments. These difficulties were noted by the Appellate Division, (see, 40 A D 2d 801, 802).

Of course, courts may continue, on the pleading record, to indicate the sentence they expect to impose. The promise must be fulfilled provided there is nothing contained in the pre-sentence report or in later learned facts rendering improvident the sentence promised (see, *People v. Griffith*, 43 A D 2d 20, 23, 25). Where a court cannot or will not impose the sentence previously promised it should specify on the record the information contained in the pre-sentence report or any other circumstance relied upon for its changed view (ABA Standards, *supra*, § 3.3[b]). Thus, arbitrariness or trifling with the legitimate expectations of pleading defendants may be avoided and the matter will be subject to appellate review.

In the *Selikoff* case, the record shows that the court in promising no imprisonment, relied upon what it was led to believe to be the minimal involvement of defendant. Upon subsequently discovering that defendant was a major piece rather than a pawn in the fraudulent scheme, the court acted quite correctly in refusing to impose the promised sentence but allowing defendant to withdraw his guilty plea. The case demonstrates that it is useful for the pleading court to note on the record its reasons or qualifications in proposing to impose any given sentence.

Bearing on the *Selikoff* case, and also on the two other cases to be discussed, is a fundamental that ought to be obvious. If the plea negotiation were to result in a unilateral "agreement" for a sentence, there would be little or no point in not proceeding immediately to sentence. There would also be little or no point in having a pre-sentence report and requiring the sentencing court to view the report before sentence.

In *People v. Campbell*, a novelty is injected: The prosecutor agrees with defendant that a promise was made to which the pleading court was not made privy. Sentence is primarily a judicial responsibility. In requiring the court's and the prosecutor's joint consent to any plea to an offense less than that charged, the Legislature sought to prevent collusive and corrupt arrangements, a condition rife before the joint control statutes were enacted (see, *Matter of McDonald v. Sobel*, 272 App. Div. 455, 460, affd. 297 N.Y. 679). Any attempt to undermine judicial control in the sentencing process must be rejected as must be any attempt to undermine the prosecutor's responsibility in recommending lesser pleas. The concern with collusive or corrupt arrangements is a persistent one (see, *Matter of Murtagh v. Maglio*, 9 A D 2d 515, 520; see, also, Denzer, Commentary to McKinney's Criminal Procedure Law, § 180.50 at 70).

Of course, a guilty plea induced by an unfulfilled promise either must be vacated or the promise honored (*Santobello v. New York*, 404 U.S. 257, 260, *supra*). The district attorney concedes that the arraignment prosecutor's promise did induce defendant's plea of guilty. That promise should be treated, in substance, although it was not in that form, that defendant

would be permitted to withdraw his plea if a prison sentence were to be imposed. Withdrawal of a plea, however, is not within the power of the prosecutor. That power rests solely in the discretion of the court (CPL 220.60, subd. 4). The prosecutor, without authority, promised that which he could not legally perform and the defendant, therefore, could not, as a matter of law, rely on that promise.

The lack of power in the prosecution distinguishes the *Campbell* situation from that involved in *Santobello v. New York* (404 U.S. 257, *supra*). In that case a prosecutor promised not to recommend a prison sentence, a promise which could be fulfilled because the prosecutor has the power, although he may choose not to exercise it, to make recommendations on sentence. In *Santobello*, another assistant prosecutor breached the promise by recommending a prison sentence.

Moreover, the record, upon which the pleading court relied and had a right to rely, contradicts the concession by the district attorney and the contention by defendant, that the plea was induced by the off-the-record promise. The defendant was expressly asked whether his plea was induced by a promise other than that the prosecutor would recommend no imprisonment. He unequivocally responded that there were no other inducements. Moreover, the pleading court made it clear that the prosecutor's record recommendation, limited as it was, was in no way binding upon the court. Defendant was told plainly and bluntly that if the pre-sentence report justified a prison sentence, then one would be imposed. At this point defendant was given and refused the opportunity to withdraw his guilty

plea. The detailed recorded plea arraignment here is unlike some minimal *pro forma* questioning which perhaps should not bar a defendant from reopening the matter despite a superficially contradictory record (see, *United States ex rel. Oliver v. Vincent*, 498 F.2d 340, 342, fn. 1 [2d Cir.]; *Hilliard v. Beto*, 465 F.2d 829, 830-831, vacated and remanded 491 F.2d 35 [5th Cir.]). In this case, however, the court was knowingly misled by the assertions of both counsel and defendant, if their present assertions are to be accepted.

A defendant, sophisticated in the criminal process, who has misled, or lied to the court, should not, at least on this record, be heard to contend that his plea was induced by an off-the-record promise. That defendant may have acted upon the advice of counsel, or with the connivance of a prosecutor, should not alter the result. Whether counsel's advice amounted to a denial of effective counsel is not presented by this appeal. That the prosecutor also misled or perhaps even lied to the court is to be deplored, but, on this record, should be of no help to defendant if only because it permits a connivance which is not tolerable.

If there be an injustice in this case, the remedy lies in a different proceeding and a different approach (*vide infra*). What is important is that the integrity of the very delicate process of plea negotiation with its potential for corruption be preserved and not be threatened by off-the-record promises, representations, implications and the like, without any kind of written memorial, on or off-the-record, and, worst of all, deliberately (or even inadvertently) concealed from the court. The danger is enhanced, and existing safeguards rendered futile,

if the detailed inquiry by a conscientious court, as occurred in this case, is assailable. The pleading court indeed made full inquiry, a purpose to be encouraged and highly recommended (ABA Standards, *supra*, §§ 1.5, 1.6, 3.3; see, also, American Law Institute Model Code of Pre-Arraignment Procedures, §§ 350.5[1], 350.8 [Tent. Draft #5, 1972]).

On oral argument in this court, the district attorney urged that the underlying evidence for the charge made it extremely doubtful that defendant could have been convicted on trial. Indeed, defendant, despite his record, may have been innocent of any wrongdoing on this charge. Post-conviction procedures are, however, available to correct any injustice, without undoing what is good in plea-taking practice, and in any such proceeding defendant would not be barred from showing, among other possibilities, that in the off-the-record plea negotiations he was misled into not protesting his innocence. At such stage of the matter defendant may be entitled to go free for innocence and not because of a shared deception on the court at plea taking.

The Appellate Term, in affirming, stated in part, quite aptly:

> "If, as the defendant, seconded by the district attorney, now urges, there was a covert agreement between prosecution and defense that if a jail sentence were imposed the defendant would be permitted to withdraw his plea, then, at the moment of that searching alternative

> proposal of choice, 'do you still nevertheless wish to plead guilty or do you wish to withdraw the plea of guilty'; then was the time that defendant, his counsel and the district attorney were under a compelling duty to the court and to the People to speak. Their silence in the face of the court's trenchant statement in unmistakable terms of the precise basis of its approval; their failure to then and there repudiate or modify the defendant's statement 'I still plead guilty', must be construed as full concurrence in the tacit joint representation that no other undisclosed term of agreement, different from the court's express understanding, existed between them. Neither the defendant, nor the district attorney, nor both of them will now be heard to say to the contrary. To hold otherwise is to make the role of the court in overseeing and supervising the delicate balancing of public and private interests in the process of plea bargaining a meaningless exercise and to deny the need for judicial approval as a salutary check against the danger of too ready abuse in this highly sensitive area of the administration of criminal justice."

Even where the entire plea agreement and any promised sentence are purportedly placed on the record, there may still be no end to claims of off-the-record promises. This is demonstrated by the third appeal before the court.

Opinion of the Court of Appeals

In *People v. Davidson*, the pleading court meticulously placed the promised sentence on the record and the defendant agreed that this was the only promise made. The "promise" was fulfilled precisely. Thus, any claim of an inconsistent off-the-record promise, by a deceased judge, is flatly contradicted by the record.

On pleading, as recorded in the minutes, all agreed that defendant would receive a sentence from three to 10 years. There was detailed inquiry by the pleading court. Now defendant and his then lawyer aver that the judge, off-the-record, had promised that he would not sentence defendant for more than four years. It is an incredible story. But even if the averments retained some "scintilla" of credibility it would merit no judicial recognition because of its effect on the plea negotiation process. The desirability of encouraging exposure on the record of what has been said, what has been agreed, and what conditions exist before performance of a "promise" may be relied upon, would be utterly negated.

In refusing to order a hearing the *coram nobis* court properly exercised its discretion by impliedly finding that under all the "circumstances attending the case, there [was] no reasonable possibility that such allegation is true" (CPL 440.30 [4] [d]).

These cases demonstrate the desirability of having as complete a record as possible of the agreements and promises which have led to a guilty plea. The usefulness of the practice will depend upon according reliance to the record and

disclosures to the court. On the other hand, there is no precise catechism to insulate the practice from subsequent attack. But it may also be said that a mechanical catechism is entitled to no reliance either.

Most often, many difficulties attending the plea negotiation process may be eliminated by placing the entire agreement on the record and insuring that all parties realize that, in all but the most unusual circumstances, no other purported agreement will be recognized. This would make for a sound general practice but it is not suggested that an absolute rule is desirable. Absolutes, however well intentioned, have a perverse way of turning into plagues.

Accordingly, the orders in each of the appeals should be affirmed.

* * * * *

In *People v. Selikoff* and *People v. Campbell:* Order affirmed.

Opinion by Breitel, Ch.J. Concur: Gabrielli, Jones, Wachtler, Rabin, Stevens and Witmer, JJ.

In *People v. Davidson:* Order affirmed.

Opinion by Breitel, Ch.J. Concur: Gabrielli, Jones, Wachtler, Rabin and Witmer, JJ.

ORDERS OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 7, 1973.

HON. JAMES D. HOPKINS, Acting Presiding Justice
HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
HON. FRANK A. GULOTTA
HON. MARCUS G. CHRIST,

Associate Justices

The People, etc.,

Respondent,

v.

Sheldon Selikoff,

Appellant.

In the above entitled cause, the above named Sheldon Selikoff, defendant, having appealed to this court from a judgment of the County Court, Westchester County, rendered August 16, 1972, convicting defendant of grand larceny in the second degree and obscenity in the second degree, upon a guilty plea, and sentencing him to a prison term of not more than five years for the larceny conviction and a $1,000 fine for the

obscenity conviction; the appeal having been argued by Irving Anolik, Esq., of counsel for appellant and submitted by Janet Cunard, Esq., of counsel for respondent; due deliberation having been had thereon; and upon the Opinion by MARTUSCELLO, J., and this court's decision slip heretofore filed and made a part hereof; it is:

ORDERED that the judgment appealed from is hereby affirmed. HOPKINS, Acting P.J., MUNDER and CHRIST, JJ., concur. GULOTTA, J., dissents and votes to reverse and remand the case to the County Court for specific performance of the sentence promise by the Trial Judge, with dissenting opinion.

ORDERED that pursuant to subd. 5 of section 460.50 of the CPL, the case is remitted to the County Court, Westchester County, which court must, upon at least two days notice to the defendant, his surety, and his attorney, promptly direct the defendant to surrender himself to the said court in order that execution of the judgment be commenced or resumed, and if necessary the said court may issue a bench warrant to secure his appearance.

Enter:

IRVING N. SELKIN
Clerk

____ A D 2d ____

A - February 8, 1973

459 E.
460 E.

The People, etc., respondent, v.
Sheldon Selikoff, appellant.

Orders of the Appellate Division

Judgment of the County Court, Westchester County, rendered August 16, 1972, affirmed.

The case is remitted to the County Court, Westchester County, for proceedings to direct defendant to surrender himself to that court in order that execution of the judgment shall be commenced or resumed (CPL 460.50, subd. 5) Opinion by MARTUSCELLO, J.

HOPKINS, Acting P.J., MUNDER and CHRIST, JJ., concur.

GULOTTA, J., dissents and votes to reverse and remand the case to the County Court for specific performance of the sentence promise by the Trial Judge, with an opinion.

May 7, 1973

PEOPLE v. SELIKOFF 459 E, 460 E.

OPINION OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT

HOPKINS, Acting P.J.,
MUNDER, MARTUSCELLO, GULOTTA and CHRIST, JJ.

(Same Title)

APPEAL from a judgment of the County Court, Westchester County (GEORGE D. BURCHELL, J.) rendered August 16, 1972, convicting defendant of grand larceny in the second degree and obscenity in the second degree, upon a guilty plea, and sentencing him to a prison term of not more than five years for the larceny conviction and a $1,000 fine for the obscenity conviction.

Irving Anolik for appellant.

Carl A. Vergari, District Attorney (Janet Cunard of counsel), for respondent.

MARTUSCELLO, J. On May 12, 1972, during the defendant's trial, he moved to withdraw his plea of not guilty and to interpose guilty pleas to grand larceny in the second degree and obscenity in the second degree, under two indictments, in full satisfaction of those two, and two other, indictments. After some colloquy between the court and the defendant had taken place, wherein the defendant acknowledged his participation in the crime of grand larceny and denied that any promises had been

made to him, the court stated that incarceration would not be required of the defendant. Specifically, this was stated:

> "THE COURT: At this point Mr. West [the assistant district attorney] I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that (bracketed matter supplied)?
>
> "SHELDON SELIKOFF: Yes, sir."

The court indicated that its statement applied as well to the defendant's plea on the obscenity indictment.

At the sentencing on August 16, 1972, the court stated:

> "At the time that such pleas were entered this Court was not aware, nor was it advised, as to the extent of your participation involving the fraudulent scheme which was the basis of the

grand larceny in the second degree of indictment No. 997 of 1970 to which you plead guilty.

"This Court, therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.

"Subsequent to this expression of this view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this count of the indictment, as well as in the other larcenies alleged in the other indictments, Indictment 998 of 1970 and 999 of 1970, involving thousands of dollars, was not peripheral, subordinate or minor, but rather major and as a principal participant in the fraud.

"In light of these facts and circumstances, the Court feels that at this time that it cannot in good conscience and in the interests of justice keep the promise here to no incarceration.

"Furthermore, it appears from your pre-sentence report filed by the Probation Department that

you deny any participation in any fraud by which sums of money were extracted from money lenders.

"Again, in regard to the indictment charging you with sexual impropriety, you, according to the pre-sentence report, deny any guilt in any such acts and claim that you are a victim of some persecution."

Accordingly, the court stated that in view of these circumstances and in the interests of justice, it would allow the defendant to withdraw his pleas of guilty. The court stated:

"Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments."

Defense counsel refused to have his client withdraw and demanded specific performance of the court's promise of no incarceration, on the authority of *Santobello v. New York*, (404 U.S. 257). The court stood by its decision and again afforded the defendant the option of withdrawing his guilty plea. The defendant refused and again expressed his desire to plead guilty and enforce the court's promise as to his sentence. The court imposed a maximum five-year sentence on the grand larceny plea and a fine on the obscenity plea.

Opinion of the Appellate Division

On this appeal the defendant again argues that he is entitled to specific performance of the court's promise of no incarceration, on the authority of *Santobello (supra).*

We affirm the judgment.

Initially it should be noted that there is no absolute right to have a guilty plea acepted *(Santobello, supra; Lynch v. Overhalser,* 369 U.S. 705). Moreover, *Santobello* is inapposite to the case at bar. In *Santobello,* negotiations regarding sentence were conducted with the prosecutor. The defendant then withdrew his previous not guilty plea to two felony counts and pleaded guilty to a lesser included offense. The prosecutor agreed to make no recommendation as to sentence. At sentencing several months later, a new prosecutor recommended the maximum sentence, which the court (which stated it was uninfluenced by that recommendation) imposed. The defendant attempted unsuccessfully to withdraw his guilty plea and his conviction was affirmed in the New York State courts. The Supreme Court of the United States held that the interests of justice and proper recognition of the prosecution's duties in relation to promises made in connection with "plea bargaining" required that the judgment be vacated and that the case be remanded to the State courts for further consideration as to whether the circumstances require only that there be specific performance of the agreement on the plea (in which case the defendant should be resentenced by a different Judge) or that the defendant be given the relief he seeks of withdrawing his guilty plea. On remand by a four to one vote, the Appellate Division, First Department *(People v. Santobello,* 39 A D 2d

654, 655), held that "due process and the interests of justice will be fully served by a remand for resentence with the specific performance of the prosecutor's promise. (See, e.g., *People v. Keehner*, 28 A D 2d 695, affd. 25 N Y 2d 884; *People v. Chadwick*, 33 A D 2d 687.)"

In *Santobello*, the defendant unsuccessfully attempted to withdraw his guilty plea and there was no public policy against specific enforcement of the prosecutor's promise. However, there cannot be an absolute sentence promise by the court at the time of acceptance of a guilty plea, as that would violate a statutory mandate and public policy. Prior to the imposition of sentence the court must order a pre-sentence investigation and may not pronounce sentence prior to receiving a written report of such investigation (CPL 390.20, subd. 1). The pre-sentence investigation "consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history, employment history, family situation, economic status, education, and personal habits" (CPL 390.30, subd. 1). While many, if not most, sentence arrangements by the court at the time of a guilty plea are expressly made conditional upon the findings of the pre-sentence report, it is clear that any such arrangement, no matter how phrased, must be considered contingent until such time as it is confirmed by the court, subsequent to its review of the pre-sentence report, by the formal imposition of sentence. To hold otherwise would frustrate the whole scheme of the statute in providing for the acceptance of lesser pleas and for the imposition of sentences thereon with regard to their deterrent influence, the rehabilitation of the defendant and the protection

of the public (Penal Law, §1.05, subd. 5). If the court has in fact made a specific sentence promise to a defendant at the time of a guilty plea which it cannot thereafter fulfill, it is perfectly fair and proper for the court to offer the defendant the opportunity to withdraw his plea, as was done at bar, and restore him to his prior position *People v. DiGiacomo,* 40 A D 2d 689; see American Bar Association Project on Minimum Standards for Criminal Justice, vol. on Pleas of Guilty, §§1.8, 2.1[a][ii][4], 3.3). The Legislature has expressly vested discretion with the court to permit a defendant to withdraw his plea at any time prior to the imposition of sentence and to restore him to his prior position (CPL 220.60, subd. 4).

In the absence of any showing of specific prejudice to the defendant or change in position in reliance upon the guilty plea, and none has been demonstrated in this record, he is in no position to object to this procedure.

Accordingly, the judgment of conviction should be affirmed.

HOPKINS, Acting P.J., MUNDER and CHRIST, JJ., concur.

GULOTTA, J. (dissenting). I would reverse the judgment and remand the case to the County Court for specific performance of the sentence promise made by the Trial Judge.

The record incontrovertibly shows an unconditional promise by the Judge that no jail sentence would be imposed. Prior to the acceptance of the guilty plea the court stated, in

haec verba, "No incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises." The "other sentence" necessarily referred to the alternative of a fine or probation.

Subsequently the court imposed a prison term of a maximum of five years and a fine of $1,000.

The court explained its action by indicating that additional information had come to its attention which made it inappropriate for it to keep its promise and offered to allow a withdrawal of the plea, which offer the defendant or anyone on his behalf misrepresented any facts which led to the court's promise.

I agree with the basic position we took in *People v. DiGiacomo*, (40 A D 2d 689) that a promise should be fulfilled or, if the arrangement is to be undone, that the People and the defendant are to be restored to the status obtaining before the plea, citing *People v. Rice* (25 N Y 2d 822). (See, also, *Santobello v. New York*, 404 U.S. 257).

However, returning to the *status quo ante* is impossible in this case where codefendants of this defendant have been tried and acquitted in the interim and the defendant himself has waived his constitutional right against self-incrimination and has made a full disclosure of his involvement in the crime to the prosecuting authorities and the Probation Department. The record shows that immediately prior to acceptance of the plea and the making of the promise there was a full discussion of the

defendant's participation in the crimes charged. The Judge, some four members of the prosecutor's staff, the defendant and his attorney took part in that session. Thus, in reliance upon the court's promise, he at that time subsequently laid bare all the facts pointing to his culpability. Furthermore, in view of the dilemma in which the court found itself, it would be somewhat unrealistic to suppose that sometime prior to sentence the District Attorney's office was not made aware of whatever additional information the Probation Department had gathered.

We need not fear any wholesale miscarriages of justice by requiring the court to abide by its commitment, since absolute promises, without reservations, such as we are dealing with here, are rare and there is really no need to make them. Faith in the judicial process is more important than seeing that this particular defendant receives a prison term, even though he may deserve it.

There may be some question about the desirability of a Trial Judge taking part in plea discussions and certainly he should not make an unqualified promise as to sentence prior to receipt of a pre-sentence report. The American Bar Association has disapproved of these practices (see American Bar Association Project on Minimum Standards for Criminal Justice, vol. on Pleas of Guilty §3.3). It acknowledges, nonetheless, that the practice of judicial participation in plea bargaining is rather widespread (id., commentary on §3.3[a]). However, in the instant case we are confronted with a *fait accompli* and the question is how to mete out evenhanded justice.

On the other side of this coin. i.e., where a defendant has demanded the right to withdraw his plea and the People have insisted on specific performance of the plea bargain, both this court in *People v. Chadwick* (33 A D 2d 687) and the First Department in *People v. Santobello* (39 A D 2d 654) have required specific performance. In contrast, here we have the defendant demanding specific performance.

The law must be fair and there is little justice in adopting or pursuing a rule which does not apply equally to the People and to the defendant.

SUPREME COURT, U. S.
FILED
DEC 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-668

SHELDON SELIKOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. ..

SHELDON SELIKOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Question Presented

When a defendant enters a negotiated plea of guilty, and the judge cannot fulfill his sentence promise, is the defendant entitled to more than an opportunity to withdraw his plea of guilty?

Facts

On May 8, 1972 trial commenced on Indictment No. 997/70 which charged the defendant and several co-defendants with various crimes arising out of a complicated real estate swindle.[1]

On May 12, 1972, the defendant appeared before Honorable George D. Burchell and entered a plea of guilty to one count of Grand Larceny in the Second Degree in full satisfaction of three indictments charging seventeen counts of Grand Larceny in the First Degree, sixteen counts of Grand Larceny in the Second Degree, three counts of Conspiracy in the Third Degree and two counts of Criminal Facilitation in the Second Degree.[2] At that time the judge

---

[1] By a separate indictment (606-70), the defendant was charged with obscenity and related offenses. As he entered a separate plea to that indictment and was fined $1,000 even though he was offered an opportunity to withdraw his plea and filed a notice of appeal, that judgment is not germane to the issues raised.

[2] The disposition of the co-defendants, who were charged in Indictments 997 and 998 is as follows:

Ruben Posner: May 12, 1972 plead guilty during trial to Offering a False Instrument for Filing in the Second Degree (he had been charged with Grand Larceny in the Second Degree [six counts], Forgery in the Second Degree and Perjury in the Second Degree in addition to the crime to which he plead guilty).

Herbert Posner: June 10, 1972 jury verdict not guilty (he had been charged with Commercial Bribe Receiving and Perjury in the First Degree).

Guy Cocozza: February 27, 1973 plead guilty to Criminal Facilitation in the Second Degree (By Indictment No. 997/70 he was charged with Grand Larceny in the Second Degree [three counts], conspiracy in the Third Degree and Criminal Facilitation in the Second Degree. On June 10, 1972 the jury acquitted on the latter four and hung on the first count of Grand Larceny in the Second Degree. The plea of guilty covered that count and Indictment No. 998/70 which charged him with Grand Larceny in the

(footnote continued on following page)

stated that based on the facts and representations made by the District Attorney's office and counsel for the defendant and known to him, it was his opinion that no incarceration was required.

Subsequent to the plea and prior to sentence, the judge discovered that he "was not aware, nor . . . advised as to the extent of (the defendant's) participation involving the fraudulent scheme which was the basis of the Grand Larceny in the Second Degree", and that the defendant's participation was "not peripheral, subordinate or minor, but rather major as a principal participant in the fraud". As a result he "(could) not in good conscience and in the interests of justice keep the promise . . . to no incarceration". The judge so advised the defendant on August 9, and gave him until August 16 to decide whether he wanted to withdraw his plea or proceed with sentence, the sentence being imprisonment. On August 16, the defendant refused the offer to withdraw his guilty plea. He was then sentenced to an indeterminate term of up to five years.

(footnote continued from preceding page)

Second Degree [two counts], Conspiracy in the Third Degree [two counts] and Criminal Facilitation in the Second Degree [two counts]).

Thomas Dunn: January 21, 1971 plead guilty to Criminal Possession of a Forged Instrument in the Third Degree (he had been charged with the crimes of Grand Larceny in the Second Degree, Conspiracy in the Third Degree, Forgery in the Second Degree and Criminal Possession of a Forged Instrument in the Second Degree).

Arnold Mann: December 21, 1972 indictment dismissed in the interest of justice (he had been charged with Criminal Facilitation in the Second Degree [two counts] and one count had been dismissed on August 6, 1971).

POINT I

It is a matter of discretion lying solely in the State courts to determine the remedy when a sentence promise is to be undone.

This Court in *Santobello* v. *New York*, 404 US 257, 30 LEd 2d 427, 92 SCt 495 (1971), clearly enunciated two principal propositions relating to "plea bargaining":

1) "There is . . . no absolute right to have a guilty plea accepted."

2) Once a guilty plea is accepted, there must be "specific performance of the agreement" *or* the defendant must be given the "opportunity to withdraw his plea of guilty," in the discretion of the state court.

There was no preference stated for either alternative and the choice was left solely to the state courts in the exercise of their discretion.

> "The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be re-sentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty."

The Court of Appeals has now held that the discretion as a matter of state law is to be exercised by the sentencing court.[3] (*People* v. *Setikoff*, 35 NY 2d 227, 360 NYS2d 623

[3] The State Legislature also recognized the fact that the exercise of discretion lies with the Court and not with the defendant when it enacted Section 220.60(4), CPL providing that at any time prior to the imposition of sentence, the Court may in its discretion, permit the defendant to withdraw his plea and restore him to his prior position.

[1974]). As there is no unique fact in the instant case which would mandate action without the exercise of discretion, there is no issue presented for review in this Court.

POINT II

There was no violation of the defendant's rights.

A defendant has a right to a jury trial to determine his guilt or innocence and the State has a right to a trial to determine a defendant's guilt or a plea of guilty as charged (220.60[1], CPL). The defendant may waive his right and enter a plea of guilty or ask the district attorney and the court to allow him to plead guilty to less than the entire indictment or to a lesser included offense in satisfaction of the charges pending against him (220.10[4][5], CPL). With the permission of the court and the consent of the district attorney, a compromise plea may be entered (220.60[3], CPL).

A defendant has a right to a jury trial to determine his guilt or innocence and the State has a right to a trial to determine a defendant's guilt or a plea of guilty as charged (220.60[1], CPL). The defendant may waive his right and enter a plea of guilty or ask the district attorney and the court to allow him to plead guilty to less than the entire indictment or to a lesser included offense in satisfaction of the charges pending against him (220.10[4][5], CPL). With the permission of the court and the consent of the district attorney, a compromise plea may be entered (220.60[3], CPL).

When the plea is entered based upon a representation as to what the sentence will be, and the judge later finds that that sentence would be inappropriate, the defendant must be given the opportunity to withdraw his plea or the sentence indicated must be imposed, in the discretion of the trial judge. As in the instant case, the compromise

plea usually severely limits the possible sentence as compared to that permissible under the original charges. Thus, if the trial judge decides that specific performance of the sentence representation would be inappropriate and gives the defendant the opportunity to withdraw his plea, the defendant has the option of letting the plea stand, thus limiting the sentence, or withdrawing his plea and standing trial on the original charges.

While a defendant is protected from being twice put in jeopardy for the same offense, jeopardy does not attach if a plea of guilty is "nullified by a court order which restores the action to its pre-pleading status" (40.30[3], CPL). Thus, when a plea of guilty is vacated, the other charges that were taken into consideration are revived and the defendant may properly be tried on the entire indictment (*People* v. *Rice*, 25 NY 2d 822, 303 NYS2d 677 [1969]).

> "If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts."
>
> *Santobello* v. *New York, supra,* footnote 2.

When the sentencing court exercises its discretion it must always consider whether if the plea is withdrawn, the parties can be returned to the status obtaining before the plea.

> "If the promised sentence was the inducement for the guilty plea, defendant is entitled to have the promise fulfilled or, if the arrangement is to be undone, the People and defendant are entitled to be restored to the status obtaining before the plea."
>
> *People* v. *Di Giacomo,* 40 AD 2d 689, 336 NYS2d 260 (1972).

Thus, when for some reason the case cannot be tried, or "(circumstances) arise which, in justice, would require

granting a defendant the consideration he was advised he would receive at the time of his guilty plea", the state court will order imposition of the indicated sentence (*People* v. *Esposito*, 32 NY2d 921, 347 NYS2d 70 [1973]; *People* v. *Selikoff*, *supra*).

In the instant case, by withdrawal of the plea, it was possible to place the parties in the *status quo ante*.[4]

> "The record does not disclose any change of position by defendant other than what occurs on any plea of guilty."

The trial judge thus, as was his prerogative in the exercise of discretion, gave the defendant an opportunity to withdraw his plea and when he refused to do so, imposed a sentence of imprisonment.

A sentence commitment in the case of a felony is as a matter of law contingent until after receipt of the probation report.

There cannot, as contended by the defendant, be any absolute sentence promise by the Court at the time of the acceptance of a guilty plea as such would be violative of the statutory scheme. Prior to imposing sentence on a felony conviction, the court must order a pre-sentence investigation "with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education and personal habit" and may not pronounce sentence prior to receiving a written report of such investigation (390.20[1]; 390.30[1], CPL). While such report may be made prior to conviction (380.30, CPL), the

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[4] While the defendant alleges (pp. 10, 28) that "he disclosed a good deal of information to the prosecutorial authorities," no information was given to the district attorney and on oral argument in the Court of Appeals counsel stated that the "information" referred to was the plea of guilty itself.

volume of work assigned to understaffed probation departments makes such impossible, especially in the case of a defendant released on bail, as extensive time may be consumed in investigation where such is not necessary (i.e.; acquittal; dismissal; misdemeanor conviction (390.20[2], to the detriment of others already convicted (see: *People ex rel. Weingard* v. *Casscles*, 40 AD 2d 530, 333 NYS2d 973 [1972]; *People* v. *Gibson*, 39 AD 2d 947, 333 NYS2d 104 [1972]). It is thus obvious that the Legislature intended that (a) a lesser plea may be accepted by the court (220.60[3], CPL); (b) a tentative sentence commitment may be made (no prohibition); (c) a complete pre-sentence investigation must be made prior to sentence (390.20[1]; 390.30[1], CPL); (d) if the voluntariness of a plea is not clear to the court, the court in its discretion may permit it to be withdrawn (220.60[4], CPL); (e) if the plea is not withdrawn, the court must impose sentence (380.20, CPL); (f) the sentence must be imposed with regard to its deterrent influence, the rehabilitation of the defendant and the protection of the public (1.05[5], PL).

Thus, after having received the probation report in which the defendant asserted his innocence and having presided over a trial involving co-defendants and co-conspirators during which the extent of the defendant's participation was for the first time fully revealed, the judge determined that he could not "in good conscience and in the interests of justice keep the promise (of) no incarceration". The judge then offered to put the defendant in the *status quo ante*. The defendant, of course, did not wish to subject himself to the term of imprisonment which the plea of not guilty permitted and thus attempted to force the judge to impose a sentence of non-imprisonment.

While the defendant contends that the facts elicited on trial were believed by the district attorney to be of no moment, such is not the fact. The district attorney believed and still believes, that the plea entered was just under the

circumstances. The fact remains that sentence is within the sole province of the court and the court must have all the facts *it* deems necessary.

POINT III

The judgment entered.

It is not contended that an admitted felon such as the defendant cannot rely on representations by a court. It is clear, however, that a convicted felon cannot have his hopes and desires override the sound exercise of discretion by the court. A defendant has no "contract" for a particular type of sentence and an arrangement as in the instant case represents as a matter of law a contingent arrangement until such time as it is confirmed by the judge subsequent to his review of the pre-sentence report by the actual imposititon of sentence. To hold otherwise would be to prevent judges from ever indicating a sentence predisposition, which would have the result of unnecessarily prohibiting pleas in those great majority of cases where the predisposition conforms to the final conclusion. Given the present realities, it would result in intolerable calendar congestion. Lest it be argued however, that no such condition was expressly affirmed at the time of original plea, it should be pointed out that this was wholly unnecessary as such a conditional nature of the sentence commitment is of necessity implied.

Further, there is no indication that the defendant has been prejudiced or has changed his position in reliance upon the plea (as might have been the case had he testified as a State's witness subsequently). Even if there had been such reliance, courts of justice are capable of protecting the defendant's interest in a less drastic manner than granting that type of inappropriate specific performance which would render the solemn exercise of judicial discretion in sentencing a robot-like compliance with the demands

of the convict. On appeal, the court could take judicial notice of the great and broad experience of defendant's counsel at the time of plea, to insure itself that there was not unreasonable reliance upon the absolute nature of the plea.

The judge at the time of accepting the guilty plea having advised the defendant that based upon the facts known to him, no imprisonment would be necessary; felt that that statement might have induced the defendant to enter the guilty plea. He therefore, in the exercise of his discretion, gave the defendant an opportunity to return to his prior position where he would have the only rights he ever had, namely to proceed to trial, to enter a plea of guilty as charged or to ask the court and the prosecutor to permit him to plead to a lesser charge.

The defendant having elected to decline the offer to withdraw his guilty plea was properly sentenced to an indeterminate term of up to five years. He may not now change his mind.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
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County Courthouse
White Plains, New York 10601
(914) 682-2161

By: JANET CUNARD BROWN
Senior Assistant District Attorney
of Counsel

APPENDIX

Transcript of Proceedings Before Burchell, J. Dated May 12, 1972 (Plea).

COUNTY COURT—PART III

COUNTY OF WESTCHESTER—STATE OF NEW YORK

Indictment Number 997/70

PEOPLE OF THE STATE OF NEW YORK

—against—

SHELDON SELIKOFF

Defendant

May 12, 1972
County Court House
White Plains, New York

BEFORE:

HON. GEORGE D. BURCHELL

County Court Judge

APPEARANCES:

CARL A. VERGARI, District Attorney
JOSEPH K. WEST, SR., Ass't D.A.
ALFRED CHRISTIANSEN, A.D.A.
County Court House
White Plains, New York

VINCENT W. LANNA, ESQ.
50 Riverdale Avenue
Yonkers, New York
For: SHELDON SELIKOFF—*Deft.*

ROSE A. IMPALLOMENI
Official Court Reporter

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Mr. West: You are Sheldon Selikoff?

Sheldon Selikoff: That is correct.

Mr. West: And you are represented in Court this morning with your attorney Mr. Lanna?

Sheldon Selikoff: Yes, sir.

Mr. West: Judge, if it please the Court I believe this defendant has an application to make. Mr. Lanna.

Mr. Lanna: If Your Honor please, this defendant is now desirous under indictment 997/70 of withdrawing his previously entered plea of not guilty under the first count of that indictment and to enter in its place instead a plea of guilty to the first count as charged in full satisfaction of that entire indictment. In addition under indictment number 606/70, this defendant is also desirous of withdrawing his previously entered plea of not guilty under the second count of that indictment and entering in its place instead, a plea of guilty to that second count in full satisfaction of indictment 606/70. Now both of the pleas of which I have just referred to are not only in satisfaction of these two indictments namely 606/70 and 997/70, but in addition are in full satisfaction of indictment numbers 998/70 and 999/70.

Mr. West: May I proceed Your Honor.

The Court: Yes.

Mr. West: Mr. Selikoff, is this plea voluntarily made by you this morning?

Sheldon Selikoff: Yes.

Mr. West: Both of these pleas, is that correct?

Sheldon Selikoff: Yes sir.

Mr. West: Have you had time to consult with Mr. Lanna prior to making these pleas?

Sheldon Selikoff: Yes sir.

Mr. West: Do you understand sir that by your plea of guilty to Grand Larceny in the second degree under indictment number 997/70 you are pleading guilty to a class "D" felony.

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: Yes sir.

Mr. West: And do you understand that that plea that you are entering this plea today just the same as if you had a trial and had been found guilty of this class "D" felony?

Sheldon: Selikoff: Yes sir.

Mr. West: Do you sir freely and voluntarily admit, that in this county on or about January 24, 1968, you stole from one J. Radley Metzker property to wit current monies of the United States of America of the aggregated value of over $1,500.

Sheldon Selikoff: Yes sir.

Mr. West: And now have you been threatened or coereed to induce this plea?

Sheldon Selikoff: No sir.

Mr. West: Do you sir withdraw all motions heretofore made with respect to all indictments now pending against you?

Sheldon Selikoff: Yes sir.

Mr. West: Have been any promises made to you sir by the Westchester County District Attorney's Office.

The Court: At this point Mr. West I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?

Sheldon Selikoff: Yes sir.

Mr. West: Now sir, have there been any other promises made to you by the Westchester County District Attorney's office?

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: No sir.

Mr. West: Have there been any promises made to you by Mr. Lanna?

Sheldon Selikoff: No sir.

Mr. West: Have you been promised anything by the Probation Department of this County?

Sheldon Selikoff: No sir.

Mr. West: And now with respect to your plea of guilty under indictment number 606/70 to the crime of obsenity in the second degree, is that plea voluntarily made by you?

Sheldon Selikoff: Yes sir.

Mr. West: Have you been threatened or coerced to induce that plea?

Sheldon Selikoff: No sir.

Mr. West: Have you had time to consult with Mr. Lanna with respect to this plea?

Sheldon Selikoff: Yes sir.

Mr. West: And do you sir freely and voluntarily admit that in the Town of Greenburgh, this County and State, on or about August 9, 1970, knowing its contents and character, you did promote and possess with the intent to promote obscene material by exhibiting a motion picture film depicting the act of sexual intercourse to one Rita Feinburg.

Sheldon Selikoff: Yes sir.

Mr. West: Do you understand sir that by rendering this plea, it is just the same as if you had a trial and had been found guilty of this class "A" misdemeanor?

Sheldon Selikoff: Yes sir.

Mr. West: Have there been any promises made to you with respect to this plea?

Sheldon Selikoff: No sir.

The Court: What I said Sheldon Selikoff in regard to the plea on the other indictment goes with this plea also. Do you understand that?

Sheldon Selikoff: Yes sir.

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

The Court: I will not answer as to what other punishment I shall impose, I will reserve to that.

Mr. West: Have there been any other promises made to you sir by anyone?

Sheldon Selikoff: No sir.

Mr. West: Judge based upon all the facts and circumstances of this case and based further on the fact that this defendant has no prior felony conviction to our knowledge, we would move for the consolidation of indictment 998 and 999 with 997, for the purpose of the plea that was entered under 997/70. We would ask the court to advise his defendant of his rights and to accept this plea.

The Court: Well Sheldon Selikoff before the court can accept your offered plea you must be advised that if you have been previously convicted of any crime or even an offense that that fact may be and if that fact is established in connection with your plea of guilty on the indictment which you are being arraigned here, that this may result in additional or different punishment than that as prescribed by law. Do you understand that sir?

Sheldon Selikoff: Yes.

The Court: With that understanding do you still wish to offer this plea of guilty?

Sheldon Selikoff: Yes sir.

The Court: The pleas have been accepted. Sentence will be set down. Mr. Lanna do you have any problem with your military service?

Mr. Lanna: Your Honor may I suggest the 19th of June?

The Court: Sentence will be the 19th of June.

Mr. West: May the record reflect that the plea is accepted during trial your Honor?

The Court: Yes sir.

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

COUNTY COURT—WESTCHESTER COUNTY

Indictment Nos. 606-70 997-70

Sentence

THE PEOPLE OF THE STATE OF NEW YORK

against

SHELDON SELIKOFF,

Defendant.

August 16, 1972
Part 3
White Plains, New York

Before:

HON. GEORGE D. BURCHELL, Judge.

APPEARANCES:

CARL A. VERGARI, Esq.
Attorney for the People
District Attorney of Westchester County
By: JOSEPH K. WEST, Esq.
Senior Assistant District Attorney

VINCENT W. LANNA, Esq.
Attorney for the Defendant
50 Riverdale Avenue
Yonkers, New York

PATRICK McKAY
Court Reporter

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Mr. West: May I proceed, Your Honor?

The Court: Yes.

Mr. West: You are Sheldon Selikoff; is that correct?

The Defendant: Yes, sir.

Mr. West: You are represented in Court this morning by your attorney, Mr. Lanna?

The Defendant: Yes, sir.

Mr. West: Judge, if it please the Court, this defendant having heretofore plead guilty under Indictment No. 606 of 1970 to obscenity in the second degree and having also plead guilty under Indictment No. 997 of 1970 to grand larceny in the second degree, the People will move for sentence.

Court Clerk: Sheldon Selikoff, do you have any legal cause to show why judgment should not now be pronounced against you?

The Defendant: No.

Court Clerk: Mr. West, do you have any recommendation to make?

Mr. West: No, Your Honor, the People have no recommendation.

Court Clerk: Mr. Lanna, would you like to address the Court?

The Court: If I may make a statement, Mr. Lanna, at this point, if I may?

Mr. Lanna: Yes, sir.

The Court: Sheldon Selikoff, on May 12th, 1972, upon the recommendation of the District Attorney, you were permitted to plead guilty to one count of grand larceny in the second degree, the first count of Indictment No. 997 of 1970, which contained six counts of grand larceny in the second degree and one count of conspiracy in the third degree. This plea to the first count of that indictment was in full satisfaction of that indictment as well as Indictment Nos.

998 of 1970 and Indictment No. 999 of 1970. Indictment No. 998 of 1970 contained two counts of grand larceny in the second degree, two counts of conspiracy in the third degree against you. Indictment No. 999 of 1970 contained twenty-five counts against you, seventeen of which were for grand larceny in the first degree, and eight of which were for grand larceny in the second degree. You were also, on the recommendation of the District Attorney, allowed to plead guilty to the second count of Indictment No. 606 of 1970; namely, to the crime of obscenity in the second degree. That was to cover three other counts of obscenity in the second degree, one count of obscenity in the first degree, and one count of sexual abuse in the third degree, and one count of criminal solicitation in the second degree, and one count of consentual sodomy. At the time that such pleas were entered, this Court was not aware, nor was it advised, as to the extent of your participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree of Indictment No. 997 of 1970 to which you plead guilty.

This Court, therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.

Subsequent to this expression of this view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for some six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this count of the indictment, as well as in the other larcenies alleged in the other indictments, Indictment 998 of 1970 and 999 of 1970, involving thousands of dollars, was not peripheral,

subordinate or minor, but rather major and as a principal participant in the fraud.

In light of these facts and circumstances, the Court feels that at this time that it cannot in good conscience and in the interests of justice keep the promise here to no incarceration.

Furthermore, it appears from your pre-sentence report filed by the Probation Department that you deny any participation in any fraud by which sums of money were extracted from money lenders.

Again, in regard to the indictment charging you with sexual impropriety, you, according to the pre-sentence report, deny any guilt in any such acts and claim that you are a victim of some persecution.

Now, in view of these circumstances and in the interests of fairness and in the belief that the ends of justice will be served, this Court believes it should allow you to withdraw your pleas of guilty to both of the indictments and have your original plea of not guilty thereto reinstated, and that you be given your day in Court to contest the charges of the People.

Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.

Now, what is the decision?

Mr. Lanna: If Your Honor please, with all due respect to the Court, Mr. Selikoff is not desirous of withdrawing his pleas of guilty as heretofore entered on May 12th, 1972 during the course of the trial under Indictment No. 997 of the year 1970. Those pleas being entered to both that indictment and Indictment No. 606 for the year 1970 in full satisfaction of those indictments and also Indictments No. 998 and 999 for the year 1970.

May I state for Your Honor although I am not aware

of what is in the pre-sentence report except to what Your Honor has already indicated, that we predicate our refusal, first, on the ground that we do not wish to withdraw those pleas. Secondly, I believe that legally, and despite what Your Honor may extract from that pre-sentence report, we have an absolute right not to withdraw them and to permit them to stand. I think the authority along those lines is the case of North Carolina against Alford, 400 US 25, which was also followed in People against Fooks, 21 NY 2d 338, and People v. Creazzo, 39 App. Div. 2d 748, and, of course, Alford, Your Honor undoubtedly knows, dealt with a situation where it was the defendant who was desirous of withdrawing a plea of guilty and the Court in North Carolina wouldn't permit it, and they went up to the U.S. Supreme Court. The Supreme Court, in substance, said that there may be many reasons why a person who professes his innocence may yet wish to enter a plea of guilty to particular charges, perhaps so similar to the person who is gun shy and does not wish to go into combat, similar to the person who does not wish to expose himself to the possibility of a conviction with an onerous sentence which might be imposed. Therefore, even though he professes his innocence, he would rather play it safe, so to speak.

However, there is yet another ground wherein this case Mr. Selikoff has a right to continue his plea. As Your Honor undoubtedly recalls, we had rather extensive discussions in chambers during the course of the trial under indictment No. 997 for the year 1970, at which time I believe several representatives of the District Attorney's Office were there: Mr. West, who was the Chief Trial Counsel, Mr. Christiansen, who was assisting him and at one stage or another we had Mr. Moley, who I believe is in charge of that Trial Division, if that is his proper title,

and, of course, Mr. Thomas Facelle, who is Chief Assistant District Attorney of this County. We discussed with you the circumstances surrounding this indictment as well as indictment 998 and 999 for the year 1970, and it's my recollection that in addition to myself, the attorney of record for Mr. Selikoff, I being trial counsel, as Your Honor might recall, Mr. Scancarelli and I both informed Your Honor that although we felt Mr. Selikoff was not under Indictment 997 of the year 1970 truly criminally implicated in it, we were most concerned regarding Indictments 998 and 999 for the year 1970, and in addition to that fact we pointed out to you Mr. Selikoff's background, that he had a prior problem in the Federal Courts out of Newark, New Jersey district, and it's my recollection that the District Attorney and his representative or representatives, depending upon which time we are speaking of, were all there and they certainly were aware of what their case file had as regards whatever Marx's testimony was going to be and they were willing to accept these pleas and did state at the time that they would have no recommendation as to sentence.

The Court: If I may interrupt you, Mr. Lanna? Were you present during the trial of the co-defendants?

Mr. Lanna: I sat through it from time to time.

The Court: In none of these discussions prior to the entering of the pleas was there any discussion about the defendant, specifically, this defendant's role, if any, in the alleged crimes before me.

Mr. Lanna: That is true. In fact—

The Court: The District Attorney may have known about it but I was not advised.

Mr. Lanna: I have to say to you, I recall we did discuss with you the fact that we were not as concerned with his role under Indictment 997 as we were under 998 and

999 of 1970, which, of course, regardless of the outcome of 997, might very well have led into those subsequent indictments and to the trial of those subsequent indictments. Now, I think Your Honor must keep in mind that when a defendant negotiates a plea he, of course, does it with the salient thought in mind and that is to negotiate the best possible plea he can get. So that he can get out from under. This defendant had four indictments and having been found guilty under any which one of these, just speculating to that, it could expose him to very serious penalties, and assuming arguendo, even though he was successful in defending three of them.

Again I say that this was brought to the attention of the Court, if not expressly, I think implicit. I think this was all part of the plea bargaining, in addition to the fact that this defendant also had undergone considerable expense in this matter which I first believe was started in February of 1970 in this Court before Judge Sullivan, at which time I think it ran through seven or eight or ten days listening to tapes and it was aborted because of newspaper publicity. We again started and took up perhaps another week or ten days of not only tapes but the selection of the jury.

The Court: I had nothing to do with any prior motions or applications made in this case.

Mr. Lanna: I agree.

The Court: I was assigned this trial, and that was my function.

Mr. Lanna: What I am trying to convey to the Court is that these are calculated decisions by all persons concerned. These are expensive decisions, and at this time the defendant feels that under that posture he has an absolute right to stand with his plea.

Now, if I may just quote for Your Honor those decisions and the law which I think is applicable, and with all

due respect, I feel that Your Honor's promise would be binding, that is, the promise that was made in May of 1972. The case I would like to quote is Santobello—

Mr. West: February of '72.

Mr. Lana: Mr. West has just corrected me, '72. In Santobello against New York, I don't have the official citation but it's 30 Law Edition 2nd 427—

The Court: I have read that case.

Mr. Lanna: I am sure, your Honor, you have. But I feel that the principles that apply in the Santobello case dealing with the prosecution rather than a Judge would be equally applicable to the Court in that there we had a promise even though inadvertent it was not kept, and in that case, if I may just quote from Page 433, "This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Now, in that case it was sent back, it was reversed and sent back, and the Supreme Court suggested one of two remedies: either specific performance or permitting a withdrawal of the plea of guilty.

Now, just recently reported with that the Appellate Division, First Department, ruled also that was the Santobello case, and that is found in 39 App. Div. 2d 654, the Appellate Division said, although the dissenting opinion, the Judge most vehemently said he would have been happy to permit the withdrawal of the plea because evidently Santobello had a very horrible background and would have been in a much worse position if the plea was withdrawn and he

permitted to go to trial on a more serious felony, despite that, the majority stated that we are bound by the law of this State under the authority of People against Keehner, 28 App. Div. 2d 559, which was affirmed by 25 NY 2d 884, also People against Chadwick, reported in 33 App. Div. 2d 687, to specific performance once a promise has been made in good faith and even though we might be sorry for it later, as long as there wasn't any false representations and any fraud perpetrated upon anyone, that even later on we might feel perhaps on negotiations or our decision or promise wasn't a good one, we are bound by it.

For those reasons, I feel that this defendant is entitled to specific performance of the promise which was made in May of 1972.

Mr. West: Judge, I would like to be heard briefly. Mr. Lanna, first of all, announces to me that this defendant now wishes to enter into the Alford type of plea whereby I am not guilty but I will plead guilty for various other reasons. During the actual plea taking, I, myself, personally asked this defendant did he freely and voluntarily admit certain things and he stated, yes. In other words, he had admitted his guilt with respect to these two crimes. My office, as Mr. Lanna has pointed out, there were numerous people there and it was our distinct understanding that this defendant would admit his guilt with respect to those two counts, with respect to those two indictments and that was the type of plea we were consenting to.

We are now told that your presentence report does indicate that this defendant now denies any guilt and I cannot say what effect that would have had on my office in consenting to this plea. There have been similar cases where my office has refused to consent to a reduced type plea where the defendant says, "I did not do it but I will plead guilty." So that might have had some effect as to my office saying we would consent to those two pleas.

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Further, there was some mention made as to whether or not my office had made known the involvement of this defendant in these crimes and I would merely state that we played for the Court a taped conversation as between this defendant and one Jay Marx, and it was our clear understanding from that recording that this defendant was conspiring then with Jay Marx to perpetrate a fraud and to refresh Your Honor's recollection of it, I would only point out the part where this defendant was alleged to have said on that tape recording, "Maybe you should strap your leg up so you will always walk with the same type limp."

Also, we feel from the actual playing of that tape we had made known to some extent anyway with respect to one incident of this defendant's involvement in the scheme.

The Court: It indicated his involvement, Mr. West, but to the extent—

Mr. West: We feel that there was made here was an actual quid pro quo pact here. This defendant pleaded guilty under Your Honor's statement that he did not feel that he should be incarcerated as a result of these pleas at that time. It would seem to us if Your Honor now having learned more of this defendant's involvement feels that he has to be incarcerated, the fair thing and the just thing would be to return this defendant to the status he was in prior to his plea and to say I cannot live up to what I said, having found out that and the interests of justice dictate something else, I will, therefore, let you, Mr. Selikoff, withdraw your plea. I don't know of anything else that Your Honor could do in the interests of justice.

It's my understanding that Your Honor has offered this defendant his opportunity to withdraw this plea and though I was not here I would like this record to show that this offer was extended to the defendant, I believe some time

last week in Court when Your Honor first made it known to this defendant that he would be given the opportunity to withdraw his plea. I would like this record to reflect that he has had that week to actually think about it.

The Court: I expressed myself in Court and I suggested to Mr. Lanna that he consult with his client and give the matter some discussion, having in mind I indicated what my direction was going to be, and that is why we are here today on the adjourned date.

Mr. Lanna: May I just be heard one moment, Your Honor, please?

The Court: I have a jury waiting.

Mr. Lanna: I know, but this is a very delicate issue. As far as Mr. West pointed out that the defendant did admit when he was questioned as to whether or not he had wilfully participated in these crimes, I think that the law has long been since settled. Specifically, when you are dealing with satisfaction of other indictments, that these statements which quite often are made before the Court are made for other purposes such as, the Alford decision, because one wishes to enter a plea for the disposition of a serious number of charges such as certainly was the situation here. If I may add, and I thank Mr. West for pointing out that these tapes were played and certainly those tapes as far as I am concerned were rather damaging to this defendant, despite what he might think, not only that, but Your Honor stated you were relying to some extent more upon Mr. Marx's testimony at the trial.

Well, of course, let me say this: Mr. Marx testified against the remaining co-defendants and he sort of had a field day as to what he was going to say against the defendant Selikoff. You know, it's human nature, especially when you are dealing with confidence people, I think we have to determine that Mr. Marx would like to give the

jury the impression that he wasn't really entirely the sole bad guy. I want you to understand the guy who isn't here who I am punching at with the use of mirrors in this room is equally as guilty as I, so don't look at me as I sit on the stand as being the only bad guy. I am only half bad.

Remember, he wasn't subject to cross examination on behalf of Selikoff. He had sort of a free rein and a field day. I can understand Your Honor's listening to it and perhaps being appalled by it but I also think the Court should have taken that factor into consideration.

With that, again, of course, as Mr. West has pointed out, we've had a week to think about this and we have thought about it a great deal. We feel that we are entitled to specific performance.

The Court: Well, I have reviewed the authorities in this matter and have given the matter serious and deep thought, and I can see my way in only one direction, Mr. Lanna, and I will proceed that way.

As I said, as I understand the procedure, I have to give you this opportunity, Mr. Selikoff, to withdraw your plea or to affirm your plea, and I gather through your attorney that you have decided to affirm your pleas of guilty; is that correct?

The Defendant: Yes, sir.

The Court: In that event, the Court, it appears, has no alternative but to impose the sentence as to each count since, by your plea of guilty, you admit your guilt and based upon the facts and circumstances as ascertained by the Court from its participation in the aforesaid trial and from the information obtained from your pre-sentence report, I am required in the exercise of my responsibility to proceed with your sentence. Before the Court proceeds with your sentence, Mr. Selikoff, do you wish to say anything more to the Court at this time?

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

The Defendant: No, sir.

The Court: All right. Under all of the facts and circumstances in regard to Indictment No. 606 of 1970, under the plea of guilty to the crime of obscenity in the second degree, a Class A misdemeanor, it is the sentence of this Court that you pay into the Court a fine of the sum of $1,000 on or before September 1, 1972.

In regard to Indictment 997 of 1970, that plea of guilty to the crime of grand larceny in the second degree, a Class D felony, for which you could receive up to seven years in State's Prison, it is the sentence of this Court that you be sentenced to State Prison for an indeterminate term, the maximum of which shall be five years.

Now, Mr. Lanna, have you any further applications to make?

Mr. Lanna: Yes, if Your Honor please—

Mr. West: Prior to that, may I interrupt Your Honor and ask that you advise this defendant of his right to appeal?

The Court: Yes. I advise you of your right to appeal from this sentence of the Court and you have thirty days to do so by filing a Notice of Appeal with our Appellate Division Court. If you wish to appeal and do not have the funds to hire a lawyer to file a required Notice of Appeal, you may apply and ask the Appellate Division if it will appoint an attorney to file the Notice of Appeal for you.

Do you understand your right of appeal?

The Defendant: Yes, sir.

The Court: All right, Mr. West?

Mr. West: Nothing else, Your Honor.

The Court: Mr. Lanna?

Mr. Lanna: If Your Honor please, I would most respectfully request that specifically in view of what has occurred this morning, I think Your Honor will readily

agree that certainly this is an appealable issue here and that this defendant be given a stay of execution so that he may have an opportunity to file a notice and a motion in seeking bail pending the appeal. If I may, I am going to ask Your Honor for two or three weeks, as I am leaving tomorrow night for Fort Bragg and I shall not return until September 2nd. I would ask if you would give this through September the 10th, Your Honor, please? Give me some time in which, not much time, actually, because I won't be here—

The Court: The 10th is a Sunday.

Mr. Lanna: I am sorry. My addition is wrong. That would be the 7th?

The Court: That's a Thursday.

Mr. Lanna: The 8th.

The Court: Yes.

Mr. West: Your Honor, do I understand the purpose of the stay was to allow counsel some time to bring on a motion for bail, what we used to call a Certificate of Reasonable Doubt?

Mr. Lanna: Yes. It's not called a Certificate of Reasonable Doubt anymore. It's an application for bail.

Mr. West: Judge, I leave it up to your discretion.

The Court: I think under the facts and circumstances, I will grant your application, Mr. Lanna.

Mr. Lanna: Thank you very much, Your Honor.

The Court: The stay of execution of sentence is hereby granted.

(Whereupon, the proceedings were concluded.)

Statutes*

New York Criminal Procedure Law

§ 40.30 Previous prosecution; what constitutes

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

§ 220.10 Plea; kinds of plea

4. Where the indictment charges but one crime, the defendant may, with both the permission of the court and the consent of the people, enter a plea of guilty of a lesser included offense.

5. Where the indictment charges two or more offenses in separate counts, the defendant may, with both the permission of the court and the consent of the people, enter a plea of:

(a) Guilty of one or more but not all of the offenses charged; or

(b) Guilty of a lesser included offense with respect to any or all of the offenses charged; or

(c) Guilty of any combination of offenses charged and lesser offenses included within other offenses charged.

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* The statutes are reproduced as they were in effect at the times in question.

§ 220.60 Plea; change of plea

1. Except as provided in subdivision two, a defendant who has entered a plea of not guilty to an indictment as a matter of right withdraw such plea at any time before rendition of a verdict and enter a plea of guilty to the entire indictment.

2. A defendant who has entered a plea of not guilty to an indictment charging the crime of murder as defined in subdivision one or three of section 125.25 of the penal law may, before the rendition of a verdict, withdraw such plea and enter a plea of guilty to the indictment only under circumstances prescribed in subdivision three of section 220-10.

3. A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter a plea of guilty to part of the indictment pursuant to subdivision four or five of section 220.10.

4. At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event the entire indictment, as it existed at the time of the plea of guilty, is restored.

§ 380.20 Sentence required

The court must pronounce sentence in every case where a conviction is entered. If an accusatory instrument con-

tains multiple counts and a conviction is entered on more than one count the court must pronounce sentence on each count.

§ 390.20 Requirement of pre-sentence report

1. Requirement for felonies. In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation.

§ 390.30 Scope of pre-sentence investigation and report

1. The investigation. The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.

New York Penal Law

§ 1.05 General Purposes

5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.